

No. 391.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE WESTERN UNION TELEGRAPH
COMPANY,
vs. H. W. BAKER.

Plaintiff in Error,

}
}

TRANSCRIPT OF RECORD.

Error to the United States Circuit Court for the District
of Washington, Northern Division.

FILED
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*In the United States Circuit Court of Appeals for the
Ninth Circuit.*

THE WESTERN UNION TELE-
GRAPH COMPANY,

Plaintiff in Error,

vs.

H. W. BAKER,

Defendant in Error.

**Stipulation that Parts Only of Record be
Printed.**

It is hereby stipulated between the parties to this cause, by their respective attorneys of record in the Court below, in pursuance of section 7 of rule 14 of the rules of this Court, adopted on November 1, 1894, that such parts only of the record in this cause in this Court, consisting of the transcript sent up from the Court below as the return of that Court to the writ of error herein, shall be printed as are not included in the parts of said record hereinbelow specified, and that the parts of said record hereinbelow specified shall be omitted in printing said record; and

that it is unnecessary to include in the printed record herein any of said parts so to be omitted therefrom in order to present fully to this Court all the points raised by the assignment of errors filed with the writ of error herein. Said parts so to be omitted are the following:

The title of the court and cause in the caption of each separate paper included in the record except the complaint and answer; the omission of such titles severally to be indicated by the insertion in the printed record, within parentheses, of the words "Title of Court and Cause," in the respective places where said title occur.

Also the following:

Description of Omitted Parts.

Transcript

page.

Notice of intention to move for new trial.

Bond for costs and supersedeas on writ of error.

Copy of writ of error.

Praecipe for transcript.

This stipulation shall not be deemed or taken to be a general appearance in this Court of the defendant in error in this cause, but shall be taken to be only a special appearance on his part solely for the purposes of this stipulation.

Dated July 9th, 1897.

I. D. McCUTCHEON and
BURLEIGH & PILES,
Attorneys for Plaintiff in Error.

PRESTON, CARR & GILMAN,
Attorneys for Defendant in Error.

[Endorsed]: Filed Aug. 3, 1897. F. D. Monckton,
Clerk.

*In the United States Circuit Court, Northern Division, State
of Washington.*

H. W. BAKER,

Plaintiff,

vs.

THE WESTERN UNION TELE-
GRAPH COMPANY, a Corporation,

Defendant.

No. 244

Complaint.

The plaintiff for complaint against the defendant, alleges:

I.

That he is and for more than five years last past has been and at this time now is a citizen of the State of Washington (formerly territory), residing in the county of King, and is a resident of the city of Seattle, in the said county of King, State of Washington.

II.

That the defendant is a corporation, known as a telegraph corporation, organized under the laws of the State of New York, is a citizen of the State of New York, and having, among other places, a place of business in the city of Seattle, King county, and does a general telegraph business over the United States of America, and especially from the city of New York through to the said city of Seattle, in the sending and receiving and general transmission of telegraph messages, and is not a citizen of the State of Washington, but is a foreign corporation and citizen, as heretofore stated.

III.

That the said firm of H. W. Baker & Co. was a partnership consisting of H. W. Baker, this plaintiff, W. H. Wilson, and J. D. Adams, and as such partnership were, on the 7th day of September, 1891, and for more than two years prior thereto had been general commission merchants and brokers, with established headquarters and established business, generally known in the community and well understood in the business circles of the community, and especially to the defendant as such general commission and brokerage house, and also as the consignees and consignors of general merchandise and as general shippers. That their place of address was the city of Seattle, more particularly on the water front of

the city of Seattle, being at the foot of University street in the city of Seattle, all of which fact was generally known and understood by all the business community of the city of Seattle, and especially the defendant, at all times hereinbefore and hereinafter mentioned.

IV.

.....

V.

That on the fourth day of September, 1891, the said H. W. Baker & Co. had occasion, as such commission merchants, in the due process of their business, dealing with merchants, to consign a certain cargo of lumber, consisting of one million two hundred and seventy one thousand seven hundred and ninety (1,271,790) feet, in that certain ship known as the ship "W. H. Lincoln," and did have occasion upon the said date to ship the said ship containing the said consignment of lumber to that certain place in Australia known as Sydney, being a large city, having business communication with the said city of Seattle and the said H. W. Baker & Co. That the said H. W. Baker & Co. as such commission merchants and consignors did, on the fourth day of September, 1891, duly consign and ship that certain ship, "W. H. Lincoln," to Sydney, consigned to the commission house of B. Singer, at the said town of Sydney, for the purpose of the disposition of said cargo of lumber according to the market

rates in the open market to the best of the capacity of the said commission house, according to the best rate to be obtained in the market, which rate was to be first made known to the said H. W. Baker & Co., their acceptance or rejection to be manifested and made known to the said B. Singer at Sydney, which was to be done upon the receipt from the said B. Singer at Sydney of the figures to be obtained in the open market and from the buyer who desired to buy the said cargo from the said "W. H. Lincoln," which had been in its manner and course the usual course and custom and proper manner and course of the consigning of cargoes and the disposition of the same in the open and usual course of commerce, and especially of consignments of lumber, in the manner and form as the said "W. H. Lincoln" was consigned and shipped and the cargo of lumber therein.

VI.

That after the said shipment of the said "W. H. Lincoln" and the said cargo of lumber to the said B. Singer at Sydney, the said B. Singer at Sydney was duly notified by the said H. W. Baker & Co. of the said consignment and requested that he wire the figure to be obtained, the said telegram going over the said defendant's wires, and from thence to be cabled to Australia, the said message being sent then and there by the said H. W. Baker & Co., and of its nature calling for an answer, and of its nature informing the said defendant that the same called for an answer, and to whom the answer was due, the emergency

and the importance of quick transmission and quick delivery of the answer thereto to the said H. W. Baker & Co. That the said message was duly signed, according to the general signature to such messages, duly sent over the said defendant's wires, and well understood by the defendant as the signature to the said messages which were sent as cablegrams, to wit, being the word "Baker." That the said telegram so signed informing the said Singer of the said consignment of the said ship "Lincoln" containing the said lumber was duly sent on September 7th, 1891, and the said message informing the said Singer of the consignment of the said lumber in the said ship "Lincoln" was dispatched over the defendant's wires to New York, and cabled per direction by the defendant via Eastern Route. That the said H. W. Baker & Co. waited for reply in order to know what disposition could be made of the cargo, and what price could be secured in the open market, according to the rates of the market at the said Sydney, Australia, and on October 1, 1891, said B. Singer, from the said town of Sydney in Australia did cable and dispatch to the said defendant a telegram as follows: "To Baker, Seattle, offered four thousand pounds cif advise accept market dull no outlet." That the said defendant, at the said city of New York, or on its said line from New York to the said city of Seattle, well knowing the importance of said message, well understanding the import and emergency of the said message from the contents thereof, negligently, carelessly, and wrongfully misdirected the said message, and wrongfully, negligently, and carelessly wrote the word "Barker" instead of and in

place of the word "Baker." That when the message arrived at the city of Seattle over the said defendant's lines, after the said defendant had so negligently and wrongfully and carelessly so misdirected the said message, the said message was permitted by the said defendant to remain in defendant's office at the city of Seattle, during the time of its transmission and preparation for transmission, and the said defendant, at the city of Seattle, well knowing through its agents and representatives, that the said message was important, emergent, and was in reply to one message sent by the said H. W. Baker & Co. to the said Singer, and knowing the importance of its quick delivery, and having full knowledge to whom the said message was intended and for whom it was written, and to whom the information therein was to be imparted, did wrongfully, negligently, and carelessly refuse to exercise care in the delivery of the said message or ascertain of whom the said message was for. . . .

VII.

That the said telegram was duly sent over the said defendant's wires, the said defendant receiving the said telegram as the carrier of telegrams and messages for value received, and the said defendant was duly paid and did receive and accept due pay and consideration for the prompt and correct transmission of the said telegram from the said B. Singer to the said H. W. Baker & Co., and did, both by its relations to the public and its public capacity as a public corporation, and its contract from the

said B. Singer and the said W. H. Baker & Co., at the time of the receipt of the said telegram, contract and agree and promise to correctly, faithfully, accurately, diligently, and carefully and with promptness receive, transmit, and deliver the said telegram from the said B. Singer to the said H. W. Baker & Co.

VIII.

That the said defendant in the city of Seattle, on the receipt of the telegram, instead of delivering the said telegram with promptness and diligence to H. W. Baker & Co., did carelessly, negligently, and wrongfully deliver the said telegram to one Abram Barker, that is, did deliver the said telegram to the place of business of the said Abram Barker, who at the time resided in the city of Seattle, was in nowise engaged in the commission business nor in any business whatsoever like unto the commission business or the brokerage business or in any business whatsoever indicating the possibility that the said telegram could be for Barker, or any other person other than the said H. W. Baker & Co.

IX.

That at the time of the said telegram as aforesaid being sent by the said B. Singer to the said H. W. Baker & Co., to wit, on October 1, 1891, the said market price of the said lumber so shipped and consigned in the said ship, "W. H. Lincoln" was the sum of four pounds a thousand,

English sterling, being, in American money, the sum of twenty dollars (\$20.00) per thousand. That the said lumber would have brought in the open market at Australia, to wit, at the said town of Sydney, to which town the said lumber was consigned, on the said date of October first, and for three days thereafter, the said aforesaid sum of four pounds sterling per thousand, which was a proper and reasonable market price for the said lumber and for the said cargo of the said ship "W.H.Lincoln." That had the said telegram which was intended for the said H.W. Baker & Co., on the said date been delivered with reasonable prudence, care, and caution, ordinary prudence, and as the duty of the said defendant required to the said H. W. Baker & Co., the said telegram and the said information therein contained would have been received by the said H. W. Baker & Co., on the said October 1st from the said B. Singer, which information of the condition of the market and of the price to be obtained for the said lumber was the only information to be had by the said H. W. Baker & Co., and the said telegram the only means the said H. W. Baker & Co. had of knowing the acceptance by the said Singer and the amount to be received than upon the said delivery of the said telegram in a reasonable time as intended, said H. W. Baker & Co. would have and could have accepted the same, as the same was reasonable and a fair market price, and the said cargo would then and there, to wit, on October first or October second, in which time, either October first or October second, the said Singer could have been

notified and would have been notified of the acceptance by the said H. W. Baker & Co. of the said four pounds sterling per thousand as aforesaid, and then and there the said offer could have been closed and the said cargo duly sold to the said Singer at the said price of four pounds sterling per thousand, which said sum the said Singer would pay and did intend then to pay and was ready to pay for the said cargo and to have paid for the said cargo and for the said lumber, and would have so paid had the said telegram from the said Singer been delivered to the said H. W. Baker & Co. with reasonable promptness and care in any reasonable time whatsoever, and the answer to the same, accepting the same, been forwarded, which would have been done, to the said Singer at Sydney as aforesaid.

X.

That immediately after October second and third the said market for the said lumber at the said town of Sydney where the said ship "Lincoln" had arrived containing the said lumber, did go down, and the said lumber and the said market fall to a small price; and although every effort and every diligence and all care, caution, and expediency was exercised by the said H. W. Baker & Co. (after the receipt of the said telegram intended for H. W. Baker & Co., and so misdirected and misdelivered by this said defendant to Barker) to sell and dispose of the said cargo in the quickest reasonable length of time that could be done with diligence, promptness, and reasonable ex-

ercise of prudence and business capacity, but yet, notwithstanding such, it was wholly impossible to sell the said cargo or dispose of the same in the open market or sell the said cargo or dispose of the same in the open market or in any wise whatsoever for any greater or other sum than the sum of eight hundred and thirty-three and twenty-seven one-hundredths dollars (\$833.27) for which sum it was necessary that the said cargo be sold, which sum was the only sum for which said cargo was sold, which was the only and reasonable sum that could be obtained at such time of the said sale, which sale was made with all the promptness that the market afforded, and the full and whole sum realized from the said cargo by the said H. W. Baker & Co., by reason of the situation and the circumstances herein, and of the sale at the said time, was the sum of eight hundred and thirty-three and twenty-seven one-hundredths (\$833.27).

XI.

That had the said telegram from the said Singer of October first, as addressed and intended for H. W. Baker & Co., and as the defendants well knew and must have well known and could have well known and understood as aforesaid been delivered or the contents of the same been informed to the said H. W. Baker & Co., that then and there, according to the amount offered in the said telegram and the condition of the market, the said assignment and the said cargo of lumber, consisting of one mil-

lion two hundred and seventy one thousand seven hundred and ninety feet, would have been sold and transferred for the sum of four pounds sterling per thousand, and would have netted to the said H. W. Baker & Co., the sum of seventy-seven hundred and forty-two and 53-100 dollars (\$7742.53), which would have been but a reasonable sum for the said cargo; but by reason of the said carelessness, negligent, and wrongful conduct of the said defendant in the misdirection of the said telegram as aforesaid, its negligent and careless delay and the negligent and careless conduct of the defendant in delivering the said telegram to the wrong person the said H. W. Baker & Co., were prevented from realizing the amount which they would have obtained and the amount they were compelled to accept by reason of the said wrong and delay of the said defendant.

XII.

That the difference between the amount the said H. W. Baker & Co. would have received had the said defendant done its duty to the said H. W. Baker & Co., and the amount that the said H. W. Baker & Co. did receive by reason of the said wrong of the said defendant was the sum of six thousand nine hundred and nine and 26-100 dollars (\$6,909.26), which said sum of six thousand nine hundred and nine and 26-100 dollars (\$6,909.26) was wholly lost to the said H. W. Baker & Co., by the said wrongful act, carelessness, and negligence of the defendant in the manner hereinbefore stated.

XIII.

That the said H. W. Baker & Co. duly notified the said defendant of its said loss at the first and earliest opportunity, and duly demanded of the said defendant reimbursement to the said H. W. Baker & Co. of the said sum so lost through the negligence of the defendant; but the said defendant wholly refused in everywise to reimburse the loss of the said H. W. Baker & Co., or to pay the damage occasioned as aforesaid to the said H. W. Baker & Co., or any part thereof.

XIV.

That the special damage and expense to the said H. W. Baker & Co., occasioned by the wrong and carelessness and negligence of the defendant is the sum of two hundred and fifty-three and 34-100 dollars (253.34), and the whole of the said damage to the said H. W. Baker & Co. was at the said first day of March, A. D. 1892, and now is the sum of seven thousand one hundred and sixty-two and 60-100 dollars (\$7,162.60).

XV.

That on the first day of November, 1892, said H. W. Baker & Co. duly transferred their business and accounts and choses in action, and all right, title, claim, and demand, both in law and in equity whatsoever, in its business and in the said claim against this defendant, to H. W. Baker, this plaintiff, who survives the partnership of

H. W. Baker & Co., being the said H. W. Baker of the firm of H. W. Baker & Co, heretofore named, and H. W. Baker is now the owner and holder in every wise of all the rights whatsoever under the said claim and of the said business.

XVI.

That this plaintiff has demanded payment of the said sum, and the defendant had wholly failed and refused to pay the same or any part thereof.

Wherefore plaintiff prays judgment against the defendant for the sum of seven thousand one hundred and sixty-two and 60-100 dollars, with interest, and costs and of legal disbursements.

STRATTON, LEWIS & GILMAN,
Attorneys for Plaintiff.

State of Washington, }
County of King. } ss. ---

H. W. Baker, being first duly sworn, upon his oath deposes and says: That he is the plaintiff named in the foregoing complaint, that he has read the same and knows the contents thereof, and that the same is true.

H. W. BAKER.

Subscribed and sworn to before me this 13th day of Febr'y, A. D. 1893.

JAS. HAMILTON LEWIS,
Notary Public in and for the State of Washington, re-
siding at Seattle.

[Endorsed]: Uncertified copy of Comp. omitting parts stricken. Filed May 19, 1893. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

Prepared by clerk by order of court.



In the United States Circuit Court, Northern Division, State of Washington.

H. W. BAKER,

Plaintiff,

vs.

THE WESTERN UNION TELE-
GRAPH COMPANY, a Corporation,

Defendant.

Answer.

Comes now the defendant in the above entitled action and for answer to the amended complaint of the plaintiff therein:

I.

Denies that it has any knowledge or information sufficient to form a belief of any matter or thing alleged in paragraphs 1, 3, 9, 10, 11, 12 and 15 of said amended complaint.

II.

Denies that it has any knowledge or information sufficient to form a belief of any matter or thing set forth in said complaint not presumptively within the knowledge of this defendant, and as to any allegations therein contained of matters and things presumptively within the knowledge of this defendant, or so charged that the same appear so to be, this defendant denies each and every thereof; and denies that by anything set forth in said complaint, or otherwise, plaintiff has been damaged \$7,162,60, or in any other sum or amount whatever.

Wherefore, defendant demands judgment against plaintiff for its costs herein most wrongfully sustained.

TURNER & McCUTCHEON,
Attorneys for Defendant.

State of Washington, }
County of King. } ss.

Edgar H. Brown, being first duly sworn, on oath says: That he is the manager of the defendant in the above entitled action at Seattle, in King county, Washington; that he has heard the foregoing answer read, knows the contents thereof and believes the same to be true.

EDGAR H. BROWN.

Subscribed and sworn to before me this 29th day of August, A. D. 1893.

J. B. MURPHY,
Notary Public, residing at Seattle, Washington.

We hereby admit service of the foregoing answer by copy, this 29th day of August, A. D. 1893.

STRATTON, LEWIS & GILMAN,
Attorneys for Plff.

[Endorsed]: Answer. Filed Aug. 29, 1893, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Trial.

Now on this 4th day of June, 1897, this cause came on regularly for trial, in open court, plaintiff being present by his attorneys, Messrs. Carr & Gilman, and defendant present by its attorneys, I. D. McCutcheon and A. F. Burleigh a jury being called come and answer to their names as follows: S. P. Connen, J. M. Izett, Augustus Griffin, M. McTeigh, Robert Knox, C. S. Merritt, Alex. Henderson, Charles Kash, J. A. Buchan, Charles Neff, B. R. Brierly and R. E. Pickerell, twelve good and lawful men duly empaneled and sworn to try the cause. All parties consenting thereto, the further trial of this cause is continued until the incoming of court at the hour of 9:30 o'clock to-morrow morning.

Record of day's trial, June 4, 1897.

[Title of Court and Cause.]

Trial (Continued).

Now the hour of 9:30 o'clock having arrived, the plaintiff being present by his counsel, Carr & Gilman, and the defendant being present by its counsel, I. D. McCutcheon and A. F. Burleigh, the jury being called, all answer to

their names, all being present in their box, this cause proceeds by the introduction of evidence and examination of witnesses on behalf of the plaintiff as well as on behalf of the defendant until the close thereof, at which time the further trial of this cause is continued by consent until the incoming of court at the hour of ten o'clock A. M. on Monday, the 7th day of June, 1897.

Record of day's trial, June 5, 1897.

[Title of Court and Cause.]

Trial (Continued).

And now the hour of ten o'clock A. M. having arrived, the plaintiff being present by his counsel, Carr and Gilman, and the defendant being present by its counsel, I. D. McCutcheon and A. F. Burleigh, the jury being called, all answer to their names, all being present in their box, this cause proceeds by the argument to the jury of the respective counsel until the close thereof.

Whereupon the jury are duly charged by the court, and retire in charge of a sworn officer to deliberate.

And now on this same day the jury return into open court, all being present in their box, when through their foreman they present the following verdict: "We, the jury in the above entitled action, do find for the plaintiff, and assess his damages at the sum of thirty-two hundred and fifteen and 60-100 dollars (\$3215.60). J. M. Izett, Foreman."

Whereupon the jury are duly discharged from further consideration of the cause.

Record days' trial, June, 7, 1897.

[Title of Court and Cause.]

Verdict.

We, the jury in the above entitled action, do find for the plaintiff, and assess his damages at the sum of thirty-two hundred and fifteen 60-100 (\$3215.60).

J. M. IZETT,
Foreman.

[Endorsed]: Verdict. Filed June 7, 1897. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

[Title Court and Cause.]

Motion for New Trial.

Now comes the defendant, by I. D. McCutcheon and Burleigh & Piles, its attorneys, and moves the court to set aside the verdict of the jury heretofore rendered in this action and to grant a new trial of said action upon the following grounds, namely:

I.

Excessive damages appearing to have been given under the influence of passion and prejudice.

II.

Error in the assessment of the amount of recovery.

III.

Insufficiency of the evidence to justify the verdict or other decision, and that it is against law.

IV.

Error in law occurring at the trial of said action and excepted to at the time by the defendant.

I. D. McCUTCHEON and BURLEIGH & PILES,
Attorneys for Defendant.

Received true copy of the enclosed motion this 8th day of June, 1897.

PRESTON, CARR & GILMAN,
Attorneys for Plff.

[Endorsed]: Motion. Filed June 8, 1897. A. Reeves Ayres, Clerk. By H. M. Walthew, Deputy.

[Title of Court and Cause.]

Order Denying Motion for New Trial.

Now on this 28th day of June, 1897, this cause having come on regularly for hearing upon defendant's motion for a new trial herein, and the court, after hearing argument of respective counsel upon said motion, and being now sufficiently advised in the premises, it is ordered that the said motion be and the same is hereby denied.

To which ruling of the court in denying the said motion, the defendant, by its counsel, here and now excepts, and its exception is allowed.

Order denying motion for new trial, entered June 28, 1897.

[Title of Court and Cause.]

Bill of Exceptions.

Be it remembered that, on the trial of the foregoing case, the following testimony was taken on behalf of plaintiff and defendant to maintain the issues respectively, and the following charge was given by the Court to the jury, and the following exceptions were then and there regularly taken: .

This cause coming on regularly for hearing, before the Honorable C. H. Hanford, Judge, sitting with a jury duly empaneled and sworn, on this 4th day of June, A. D. 1897, at the hour of ten o'clock A. M.; the plaintiff being present in person and represented by E. M. Carr, Esq., and L. C. Gilman, Esq., of counsel for plaintiff, and the defendant being represented by I. D. McCutcheon, Esq., and A. F. Burleigh, Esq., of counsel for the defendant, whereupon the following testimony is given and proceedings are had:

On application, Messrs. Preston, Carr & Gilman were substituted as attorneys of record for the plaintiff in place of Messrs. Stratton, Lewis & Gilman.

(The jury having been examined, duly empaneled, and sworn to try the case, the Court takes a recess until Saturday, June 5th, 1897, at 9:30 A. M.)

June 5th, 1897, 9:30 A. M.

HOWARD W. BAKER, a witness produced in his own behalf being first duly sworn, testified as follows:

Q. (By Mr. GILMAN).—Your name is H. W. Baker?

A. Yes, sir.

Q. Mr. Baker, of what place were you a citizen and where were you residing at the time of the commencement of this action?

A. Seattle, Washington.

Q. And where are you now residing?

A. In Chicago.

Q. Have you changed your residence to the city of Chicago or are you engaged there temporarily?

A. I am working there for a firm temporarily.

Q. In what business were you engaged in 1891?

A. Storage, shipping, and commission business.

Q. Were there others associated with you?

A. Yes, sir.

Q. And who were they?

A. William H. Wilson.

Q. And under what firm name did you do business?

A. H. W. Baker & Co.

Q. How long had you been engaged in that business prior to 1891?

A. Four or five years.

Q. Do you know the firm of B. Singer & Company, doing business at Sydney, Australia?

A. Yes, sir.

Q. What was their business?

A. They were consignees, brokers, general agents and merchants, and merchandise insurance agents.

Q. Did you, in the fall of 1891 make any business arrangement with the firm of B. Singer & Company, or did your firm make any such arrangement?

A. Yes, sir.

Q. What was that arrangement?

A. We arranged with them to handle, as consignees, our lumber business in Sydney, Australia, from the Sound.

Q. Pursuant to that arrangement, what did you do with reference to making a consignment of lumber?

A. We bought a cargo of lumber in Tacoma, and consigned it to B. Singer & Company for our account.

Q. By what ship was it sent?

A. The ship "W. H. Lincoln."

Q. And what was the amount of the cargo?

A. It was about one million two hundred and sixty thousand feet or one million two hundred and seventy thousand—about a million and a quarter.

Q. What kind of lumber?

A. It was what you would call merchantable lumber, some of it was dressed lumber, and some of it was lath.

Q. How was B. Singer & Company to sell this lumber when it was received there, or were they to sell it before its receipt?

A. That would depend on the condition of the market; whatever would suggest itself as to the best advantage.

Q. What arrangements, if any, were made to keep you advised as to the price at which a sale should be had?

A. They were to keep us advised by cable—receive instructions by cable.

Q. Did you, yourself, also keep a watch on the Australian markets, through the market reports?

A. Yes, sir.

Q. After the ship sailed, I will ask you what you learned in reference to the Australian market?

A. We learned just about the time she was sailing that there was some dullness being felt there, and shortly after she sailed, we learned from various market reports,

which were received in this country, as the result of cables, to other consignors in San Francisco, that the outlook there was not good, and we received a cable from Singer, I think about 10 days after the ship started, saying that there was considerable on the way there and that the outlook was not good, or something to that effect.

Q. Now on the 9th of October, did you receive a telegram over the lines of the Western Union Telegraph Company?

A. Yes, sir.

Q. I will ask you whether you had been doing business with the Western Union Telegraph Company during the time you had been in business in Seattle?

A. Yes, sir.

Q. How extensively?

A. We done business with them for 2 or 3 years, probably an average of from thirty to sixty dollars a month and sometimes a little more and sometimes a little less.

Q. And were the employes of the company acquainted with you and your place of business?

A. Yes, sir.

Q. Who was the manager of the Western Union Telegraph Company at that time?

A. Mr. Brown.

Q. Was he acquainted with you and your place of business?

A. Yes, sir.

Q. On the morning of the 9th of October, did you receive a telegram from the Western Union office, and over the Western Union lines?

A. Yes, sir, I received a cablegram.

Q. I will ask you to look at that (showing document to witness) and state whether that is the cablegram you received?

A. Yes, sir.

Cablegram identified by the witness, received in evidence without objection and marked "Plaintiff's Exhibit A," and read to the jury as follows:

Plaintiff's Exhibit "A."

"Sydney, October 1, 1891. Received at Seattle, Wash. 8:07 A. M. To Barker, Seattle. Offered four pounds thousand cif advise accept market dull no outlet."

Q. From whom did you receive the cablegram, Mr. Baker?

A. Do you mean who brought it to the office?

Q. Yes.

A. It was one of the messenger boys of the Western Union.

Q. Upon opening the cablegram, what did you ascertain?

A. I saw it was eight or nine days old.

Q. What did you then do?

A. I rang up the Western Union Company's telegraph office and telephoned them and wanted to know how it happened.

Q. What answer did you receive?

A. I told them that we just received a cable which showed by the dates that it was in town eight or nine days, and wanted to know what the matter was, and they

said it came directed to Barker instead of Baker—they didn't say, instead of Baker, but it came directed Barker, and had been put in the desk of Abraham Barker of the Merchants' National Bank, and he had been away and they did not find out the error until he got back, and that was why it had been delayed eight or ten days, and then they wired to New York and found a mistake had been made and it should be Baker, and they brought it down to us at once. That was the next morning.

Q. After the conversation over the telephone, did anybody connected with the Western Union come to your office?

A. Mr. Brown came down.

Q. What occurred between you and him?

A. He came down there that afternoon. Why he said he was sorry it happened, but I told him that I was also sorry it happened; that probably it made a great deal of difference with us. I told him that everything was going to pieces in the Australian market, and the chances was it might have lost us several thousand dollars. That I would not know until I could find out by communicating with them there. He said, as soon as they found out the mistake, they brought it right down, and he seemed to feel very badly over it, and so did I. I asked him if he knew where the mistake happened, and he said he didn't, that he had wired New York, on the night before, and they immediately wired back that it should be Baker, and I asked him to look into the matter and let me know again; that if we suffered any damage from it, that the Western Union Telegraph Company would have to pay for it.

Q. Did he subsequently have a conversation with you regarding the same matter?

A. He came down two or three days later. I don't remember just how soon it was—some time during the week—and offered to pay us the amount that that cablegram cost, and also the one that we sent to Sidney, saying that this had been delayed, and asking how things then stood, and he offered that as a settlement, but I would not take it. That was a matter probably of forty or fifty dollars and if we lost anything, it would be probably several thousand, and I told him then at that time that we would go ahead and do the best we could with it and hoped that there would not be any loss, and if there was, of course I would hold the Western Union Telegraph Company for it.

Q. Did he state anything in reference to the custom of telegraph companies or of his company in making settlements in matters of this kind?

A. He said when they made a mistake, it was always customary to rebate the cost of the telegram, on the theory that it was no use to the customer receiving them.

Q. Now, taking the telegram itself, Mr. Baker, will you explain to the jury the meaning of the term "c. i. f."?

A. c. i. f.—the word is "cif"—it is a term used as a cipher in maritime and foreign commercial matters, and means "cost, insurance, freight."

Q. And what is the meaning of a sale "c. i. f."?

A. A sale on those terms would be a sale at the price of the commodity upon which the sale was being figured at the point or port of destination, wherever it might be

shipped either by steam or vessel, and means the cost of the article at the port of departure at the invoice price; added to that, the marine insurance on it for the voyage, and added to that the freight from the port of clearance to the port to which it is consigned.

Q. That is paid by whom?

A. That is paid by the consignor in the case where the offer is made "cost insurance, and freight." Those three items are covered by the consignor.

Q. What items does the consignee in a sale of that kind, pay?

A. He pays no items of that character; he gets the cargo of goods, whatever they may be, at that price, which is clear to that time, what is called "Ex ship's tackle." The ship delivers it along side to the consignee, and the consignee, in addition to that, pays wharfage charges, if any, and handling, stevedoring, and stacking, etc. duty and all charges incidental to the handling, or entering into the port, of the goods in question.

Q. Do you know the difference between a sale "c. i. f." and a sale laid down in the yards at Sydney?

A. Well you mean in lumber?

Q. Yes in lumber?

A. It varies in different articles.

Q. In this kind of a cargo.

A. It varies there about two pounds to two and a quarter; two pounds, ten shillings and something.

Q. That is a sale in the yard would be that much more than a sale c. i. f.?

A. By a yard sale—they seldom sell cargo lots out of

the yard. Generally it is cargo lots and in large quantities, and I presume that is taken into consideration.

Q. How is a sale, *c. i. f.* affected when the cargo is still on the way?

A. It is affected by transfer of the bill of lading with the insurance policy attached and also the invoice receipted.

Q. I will ask you whether or not your bill of lading and insurance policy on this cargo had been transferred to Sidney?

A. Yes, sir.

Q. And it was there at the time this cablegram was received?

A. Yes, sir.

Q. Mr. Baker, if this cablegram had been received by you on the 1st day of October, what action would you have taken upon it?

A. We would have accepted it at once.

Q. And upon its acceptance, what would have been your instructions to Sydney and what would have been done in Sydney?

A. If we had accepted, we simply would have cabled "Offer accepted," and then in the usual course of matters of that kind, would have made the proper transfers, and remitted to us, and conclusion of the account.

Q. You would have transferred the bill of lading and the insurance policy to the purchaser?

A. Yes, sir.

Q. Now, upon the discovery of this delay by you, what did you do towards handling the cargo in Sydney?

A. I cabled to Singer that the message had been delayed, asking also either what was the condition of the

market, or what offer could be obtained at that time. I think that that cablegram, we sent on the afternoon of that same day—on the afternoon of the 9th.

Q. I will ask you if it was not on October the 9th, the same day that the cablegram was sent?

A. Yes, sir.

Q. I will ask you, if that (showing document to witness) is a copy of the telegram taken from your books?

A. Yes, sir—no, sir, this is not; this is one that we sent about a week afterwards, trying to get an offer.

Q. Is that the one (showing another paper to witness)?

A. That is the one.

Document identified by the witness received in evidence without objection and marked "Plaintiff's Exhibit B" and read to the jury as follows:

Plaintiff's Exhibit "B."

"October 9, 1891. Ritual, Sydney. Message delayed wire conditions and offerings to-day. Baker."

Q. This "Ritual" was the cable address of Singer & Company? A. Yes, sir.

Q. And afterwards, a week later, did you send another cablegram to them? (Showing document to witness.)

A. Yes, sir.

Q. Is that a copy?

A. That is the one.

Document identified by the witness received in evidence without objection and marked "Plaintiff's Exhibit C" and read to the jury as follows:

Plaintiff's Exhibit "C."

"Oct. 16th. Ritual, Sydney. What condition market what offers. Rush this and charge H. W. B. & Co."

Q. That note at the end of that, which says, "Rush this and charge H. W. B. & Co.," was simply a memorandum from you to the office here?

A. Yes, sir, to let them know it was important and rush it.

Q. Did you succeed Mr. Baker in getting any satisfactory offers on the Sydney market for this lumber?

A. No, sir.

Q. Just state what you did from that time forward with reference to the lumber?

A. Well, we figured in the first place—we judged from cablegrams we then received from Singer and also from general market reports, that the lumber market there was in a condition of panic, which possibly would not last over sixty days or so, that is, with the prices at as low a stage as they were at that time.

Counsel for defendant objects to the witness stating what he thought instead of what he did.

Q. You state what you did Mr. Baker?

A. We waited until the arrival of the ship in Sydney and ordered the cargo discharged and handled by yard sales instead of cargo lot afloat.

Q. What efforts did you make to dispose of the cargo?

A. After arrival?

Q. Yes, and before?

A. Prior to arrival, we had made efforts through our consignees and agents there to secure what we call, "cargo offerings" for us, for the cargo of lumber, c. i. f., as that would rid us of any of the expense and further investment of handling it ashore, and it would be a little bit quicker, but we were unable to get an offer that was not at the lowest possible price and that we would consider properly advantageous, so that the cargo was landed and sold by people well experienced in the business there and to the best possible advantage, the matter was entirely wound up, and we received statement and account sales, in February of the following year. The vessel's discharge was not completed until about the early part of January. The lumber was sold off in small lots to various purchasers.

Q. You put the management over into proper hands?

A. Yes, sir.

Q. Whose hands?

A. The bank of New Zealand; they made advances for storage and wharfage and so on, for our account.

Q. What was the condition of the Australian market in the interim?

A. The market did not recover at all and did not for some time after that.

Q. And what was the amount that you finally realized from the sale of the lumber?

A. We got about \$833—one hundred and some odd pounds.

Q. Was there any portion of the cargo injured in any way?

A. Yes, sir, there was about 16,000 feet of it destroyed by fire in Sydney, just as they were finishing the discharge of the vessel, after she had been there about a month, the residue of the cargo caught fire and destroyed the ship and about 16,000 feet of lumber and some lath.

Q. So that the total which you received from this shipment of lumber which you made was some eight hundred dollars?

A. Yes, sir.

Q. Mr. Baker, I will ask you what steps you ever took with the telegraph company to ascertain where this mistake had been made and the cause of it other than what you have mentioned?

A. Well, I asked Mr. Brown two or three times subsequent to the time the error occurred, as to whether they found out just exactly where they made the mistake, but he was noncommittal after that—he would not say.

Counsel for defendant objects to the witness stating the declarations of Mr. Brown after the occurrence for the reason that the same is irrelevant, immaterial, and incompetent and not binding upon the company. Which objection is by the court overruled and an exception noted for defendant.

A. (Continuing.) I could not get any satisfaction out

of Mr. Brown, definite, to suit me, and I was in New York, during the following summer, that was the summer of 1892, and I called on the Western Union building up on Broadway and inquired where the cable department was and who had charge of it, and they told me Mr. O'Leary had charge of it, on the second floor and I went up and saw him.

Q. State what occurred between you and Mr. O'Leary?

A. I told him my name was Baker from Seattle and that we had had a telegram come through some time before in the fall from Sydney, a cablegram, and I wanted to use it for certain purposes in New York and I would like to have a copy of it, as I hadn't time to get one from Seattle to use at the time. He asked me the date of it and I told him. He started over to his files—over toward something that looked like files, and came back and asked me if I was Baker, the shipping merchant in Seattle. I told him I was. Well, he said that—

Counsel for defendant objects to the witness relating his conversation with Mr. O'Leary on the ground that the same is irrelevant, immaterial, and incompetent and no proper foundation has been laid. Which objection is by the court overruled and an exception noted for defendant.

A. (Continuing). He said the matter had been up and that they had some correspondence about it and that he now remembered which telegram it was, and he said he could not give me a copy, because it was against the rules of the telegraph company to give any copies of messages from the office intransmission, and I then told him

that that despatch, as he probably knew, had come directed "Barker," and as the result of the error, we had lost several thousand dollars; that I wanted to find out where the mistake had been made; I had been given to understand in Seattle at the time that it had been made in New York, and that that had afterwards been denied—not denied, not directly, but by implication—and I wanted to find out while I was there. If the mistake had not been made by the Western Union Telegraph Company or by any of their lines, we would drop the matter and if they hadn't done it, we wanted to find out who had, and it would avoid trouble and avoid a lawsuit, and he refused to give me the information.

Q. Was there any question raised by O'Leary as to your identity?

A. No, sir, I think I gave him my card. He had possibly seen our letterhead before, and it was quite like it.

Q. Now, what steps did you take towards making a claim against the Western Union Telegraph Company?

A. We had demand made on the Western Union Telegraph Company by our attorneys Hawley & Prouty—Mr. Prouty made the demand.

Counsel for defendant admits that some six or eight months after this occurrence, Messrs. Hawley & Prouty did write a letter to Mr. Fearsons, attorney of the company in New York.

A. (Continuing.) That letter to Mr. Fearsons was simply to know whether they would settle up or we would

sue. We didn't make the demand on the attorney of the company, we made demand on Mr. Brown.

Q. Now, do you recollect the time this claim was made on Mr. Brown, or about what time?

A. I don't exactly; my impression is that we made the demand for whatever might be the damage at the time this matter occurred, but the actual amount was not demanded, till after the return of all papers, which was in the spring of 1892, and my recollection is that Mr. Prouty made that demand personally after or just before he drew up the complaint, before filing.

Q. Do you recollect the amount of the claims which you made?

A. It was \$7200 (examining statement), no \$7,162.60.

Counsel for plaintiff offers in evidence letter of Mr. G. H. Fearsons to H. W. Prouty, Esq., received in response to plaintiff's demand; which letter is received in evidence without objection, marked "Plaintiff's Exhibit D" and read to the jury as follows:

Plaintiff's Exhibit "D."

"Law Department, Western Union Telegraph Company.

195 Broadway, New York, May 28th, 1892.

Henry W. Prouty, Esq., Attorney at Law, Seattle, Washington.

Dear Sir: The papers relating to the complaint of Messrs. H. W. Baker & Co., on account of alleged delay in delivery of a message to them from Sydney, October 1st, 1891, have been referred to me.

Investigation shows that the message, as received by the Western Union, was not addressed to "Baker," but to "Barker," and was therefore delivered to Mr. Barker, and it was only when he returned the message that we could report nondelivery to Sidney and obtain the correct address.

I beg to assure you that no error occurred on the Western Union lines, or on the lines of any cable company controlled or operated by it. I am advised that the error appears to have occurred on the lines of the Eastern Telegraph Company. I must therefore decline to entertain any claim in the matter.

Very truly yours,

(Signed) GEO. H. FEARSONS,
General Attorney."

Q. In addition to the loss which you suffered by not being able to accept this offer, what expenses were you put to in obtaining a new sale, cost of cablegrams, etc.?

A. \$79 to one company, for one month and \$140 or \$150 I think.

Q. I will ask you to look at those figures and state if they are correct—what is the last item there?

A. \$174.25.

Q. Making a total of—

A. \$253.34.

Q. Was that occasioned by this misdelivery of this telegram? A. Yes, sir.

Q. Did Mr. Wilson afterwards retire from this business? A. Yes, sir.

Q. Who succeeded to the business?

A. Why, nobody. I simply continued the business. Wilson retired.

Q. Everything was turned over and assigned to you?

A. No, we simply made an entry to his account on the books, closing it out into mine, and simply took the receipt. He retired from the business and his account was closed out, and I took the receipt, or the business took a receipt for what he drew to his credit of his personal account, and that was all there was about it.

Q. And that all was due the business of any kind was turned over to you?

A. Yes, sir, the business continued right along, and I was H. W. Baker & Co., after that.

Cross-Examination.

Q. (By Mr. BURLEIGH)—You say you consigned the ship of lumber to Singer & Company in September, 1891, at Sydney, Australia?

A. Yes, sir.

Q. What was the name of that ship?

A. W. H. Lincoln.

Q. How much lumber did you send over on it?

A. About twelve hundred thousand feet—one million two hundred and seventy thousand feet I think it figured.

Q. Did you advise them that you had sent the lumber?

A. Yes, sir.

Q. How did you do it?

A. We advised them by cable and also by letter inclosing the invoice, the Marine Insurance certificate and the bill of lading.

Q. Was this the first transaction you had with Sydney?
A. Yes, sir.

Q. The first consignment you made?

A. Yes, sir.

Q. When you advised them by cable, what line did you use?

A. I don't recollect, but I think it was the Postal.

Q. That is the Postal Telegraph Company's line?

A. Yes, out of here.

Q. That is an opposition line to the Western Union, is it not?

A. Well, I don't know just how far they carry that sort of thing.

Q. You know, as a matter of fact, it is an opposition line?

A. I know it is a separate line so far as the United States is concerned.

Q. And you sent the advice of the consignment of this cargo of lumber over the Postal Telegraph Company's lines?
A. That is my impression.

Q. Now, Mr. Baker, you aver in your complaint that this change of address in the telegram of "Baker" to "Barker" was made in the city of New York; as a matter of fact, you do not know whether it was made there or not, do you?

A. No, sir, I do not. I made that statement in the complaint from information, I got from Mr. Brown and from Mr. O'Leary.

Q. I say, you did not know whether it was made there or not?

A. I made it on the information I got from Mr. Brown.

Q. I asked you if you knew.

The COURT.—I want to say to you Mr. Baker that this is cross-examination and when you are asked a question, do not make any argument or explanation but answer the question. Your counsel will see that all the explanations go in before the jury at the proper time.

Q. (By Mr. BURLEIGH)—Now, as a matter of fact, you do not know where the mistake occurred, do you?

A. No, sir.

Q. You do not know where the change was made?

A. No.

Q. You say that this telegram was brought to you on the 9th day of October?

A. Yes.

Q. And you sent a message of inquiry on the same day “Message delayed wire conditions and offerings to-day”?

A. Yes, sir.

Q. Did you get an answer to that?

A. No, sir.

Q. You didn’t get any answer?

A. No, sir.

Q. Was that sent by the Western Union or the Postal Telegraph Company’s lines?

A. I could not say for sure, but I think probably by the Postal.

Q. As a matter of fact, all this correspondence was carried on by you over the Postal Telegraph Company’s line, after the message of October 1st was delivered?

A. Yes. We didn’t have any more—we didn’t send any more.

Q. You didn’t use the Western Union?

A. No, sir.

Q. On October 16th, you sent another message of inquiry, "What condition market. What offers" did you get any answer to that?

A. We got an answer to that, I think some few days afterwards.

Q. Didn't you get an answer on the 19th, advising you that you could get seventy-two shillings and six pence a thousand for the cargo of lumber?

A. No, we got a cable a few days after that advising us that we could get seventy-two net.

Q. Was not that the message you got (showing)?

A. Yes, sir.

Q. Now just explain to the jury if you please what this telegram means, as to the price, "Market demoralize offered seventy-two shillings net cif reply immediate."

A. That would mean that the offer was seventy-two shillings, we to pay freight and insurance out of that.

Q. Then, this was just eight shillings less than the other offer?

A. Yes.

Q. If you had accepted this offer, what would you loss have been. Just figure that out for the jury, as accurately as possible.

A. It is eight shilling per thousand feet, and there was twelve hundred thousand feet—twelve hundred and seventy-two thousand feet—

Q. If you had accepted it, what would your loss have been?

A. It is \$2468.

Q. \$2468.

A. That is on the basis of eight shillings to the thousand.

Q. Eight shillings loss?

A. You are to understand that is not what we lost on the cargo, that is the difference between four pounds and seventy-two shillings.

Here the telegram just identified by the witness is introduced in evidence as a part of the cross-examination, made "Defendant's Exhibit No. 1" and reads as follows:

Defendant's Exhibit No. 1.

"Sydney, 10-19, 1891. Received at Seattle, Wash. 8:04 A. M. To Baker, Seattle. Market demoralize offered seventy-two shillings net cif reply immediate."

Q. As a matter of fact, you did not accept that offer?

A. No, sir.

Q. Notwithstanding the market was falling?

A. No, sir.

Q. How long did you keep that cargo of lumber before you authorized a sale?

A. Where, in Sidney?

Q. Yes?

A. We didn't keep it there at all.

Q. Where did you keep it?

A. Before we authorized a sale.

Q. When did you authorize a sale of it?

A. We authorized the sale after the arrival of the cargo.

Q. When did it get there?

A. It got there I think in the early part of December. I am not making positive answers.

Q. I want to get at it, about?

A. The actual date—we had a cablegram for it—I think it is the early part of December.

Q. If you have that cablegram, I would like to fix that date?

A. I don't know whether we have got it or not.

November 20th.

Mr. GILMAN.—A. Yes, sir, it was the latter part of November.

Q. (By Mr. BURLEIGH)—Is this right (showing paper to witness)?

A. That is my recollection, we afterwards found out she arrived on the day before.

Q. You could just as well have sold that cargo of lumber any time before the ship arrived, on any other suggestion made by cable, as on the message of October the 1st—the cargo didn't have to be there in order to sell?

A. No, sir.

Q. You could have sold it at any time?

A. Well, we could not.

Q. Why not?

A. When you have got a panicky market in the lumber business you can't get cargo offerings every day. We

got one that was a loss in eight days, a loss in thirteen days, of about twenty-six or seven hundred dollars, and the panic there, and panics don't as a rule last over sixty days.

Q. You knew the market was going to pieces?

A. We knew it had gone.

Q. Didn't it keep going to pieces?

A. No, sir, it was pretty close to bottom then?

Q. Didn't it keep getting—

A. —Subsequent results—

Q. Didn't it keep going to pieces?

A. Not much more.

Q. Did you get more than seventy-two shillings for this lumber? A. No, sir.

Q. Then it kept going down didn't it?

A. It went down to some extent. We sold it in an entirely different way.

Q. You sold it by auction—you auctioned it off?

A. Not all of it.

Q. Most of it?

A. Some of it in Sidney.

Q. Some of it burned up?

A. About sixteen thousand feet.

Q. You had a fire in the ship?

A. The ship burned up.

Q. What did you get for it finally by the thousand?

A. My recollection is it was about five pounds.

Q. Five pounds a thousand?

A. Yes, sir.

Q. Then you got a pound more than you were offered on the 1st of October.

A. Gross, yes, sir.

Q. I mean net, in the same way this offer came?

A. No, sir, net we only got about two and three-quarter pounds. By "net" I mean bringing it down to the "c. i. f." basis, on which that offer was made.

Q. You got two and three-quarter pounds you say, that would be about two pounds and fifteen shillings?

A. I never figured it up exactly.

Q. And when did you sell it?

A. We sold it during the month of January and part of February as called for—when there was demand in the market.

Q. What date?

A. I say we sold it during the months of January and February when there was demand.

Q. Then you held it all that time before it was sold?

A. I want to correct that statement; we sold part of it while the vessel was being discharged; as it would be landed and there was an opportunity to make a sale it would be sold.

Q. The market finally got so bad that you could not sell it except by piecemeal?

A. Well, we could not do that prior to the arrival of the ship. We sold it that way as the market was in bad shape and nobody would make cargo offerings. There was other vessels there and we sold it off in smaller lots and got a little better price.

Q. This offer of seventy-two shillings made on the 19th of October was a cargo offering?

A. That was a cargo offering.

Q. On the bill of lading just the same as the offer of October 1st.

A. Yes, sir.

Q. That you declined?

A. Yes, sir.

Q. Or did you just not say anything about it, which?

A. No. We declined that.

Q. When was it that you made this visit to Mr. M. J. O'Leary in New York City to enquire about this telegram?

A. It was on the 13th of June, 1892.

Q. Did you receive this letter of Mr. Fearsons' that has been offered in evidence before you went there?

A. I don't remember whether I had seen the letter or not. I never received it.

Q. It was sent to your attorney, and had you not seen it before you went east?

A. I don't remember possibly I had.

Q. Had you not been advised at the time you made your visit to Mr. O'Leary that the Western Union Telegraph Company claimed that this error had occurred before the message was delivered to them at Penzance?

A. No, sir.

Q. When did you go east?

A. I don't remember just when I went. I stopped a week in Chicago on my way and I had been there a day or two and I went up to see Mr. O'Leary, in New York. I left here in the later part of May sometime.

Redirect Examination.

Q. (By Mr. GILMAN)—You state that you alleged in your complaint that the mistake was made in New York and you have testified that you do not know where the mistake in the telegram was made; now state the reason you had for alleging that it occurred in New York?

Counsel for defendant objects as not proper redirect examination. Which objection was by the Court overruled and an exception noted for defendant.

A. When the complaint was signed, I signed it believing the mistake had been made in New York from the statement of Mr. Brown and also the girl that answered the telephone when I rang up about the message on morning it was delivered to me, and of course, that was strengthened in my mind by Mr. O'Leary, although Mr. O'Leary did not state that the mistake was made in New York.

Q. You mean that Mr. O'Leary's conduct strengthened your belief in that matter?

A. Yes, sir.

Q. In reference to this offer of seventy two shillings, state the reasons you did not accept that, Mr. Baker?

Counsel for defendant objects as not proper rebuttal testimony. Which objection is by the court overruled and an exception noted for defendant.

A. The reason we did not accept that there was a loss between that and the other offer we got of twenty-five hundred dollars in a few days; it showed a panicky state of the market, and there was no reason that we should

consider that a panic will last any great length of time. We had about forty or possibly sixty days yet to elapse prior to the arrival of the vessel during which time there would be no charge against us for storage and handling or anything of that kind and we thought it very safe to take chances on the market getting in better shape by the arrival of the vessel than it was at that time. That was during the time of the Australian panic and the building associations failing there and it looked like a clear panic that would recover at least to some extent, and we felt it our duty not to close it up just to get rid of it, but to do the best we could.

Q. Did you take any advice as to what you should do in reference to the matter?

A. Yes, sir. We took advice of different kinds. I consulted with some lumbermen on the Sound here; I telegraphed over to the St. Paul & Tacoma Lumber Company asking what they thought of the situation and they said it was bad but they didn't think it would be so bad in sixty days.

Q. After receiving that information you used your best judgment in not making the sale.

A. Yes.

Q. Did you take legal advice as to your duty towards the Western Union Telegraph Company?

A. Yes, sir.

Q. What was the result?

A. I asked our attorneys Hawley & Prouty, and they told us it was our duty to handle the matter just the same as if it was our own money that we had lost and were

losing again, and we would have to guard it properly and use our best judgment and keep the loss as small as possible.

Recross-Examination.

Q. (By Mr. BURLEIGH)—You acted then on your own judgment and at your own risk, did you in selling this lumber?

A. We acted on our own judgment. As to acting on our own risk, I don't exactly understand what you mean by that.

Q. Well, you risked this matter of loss on your judgment about selling the lumber didn't you?

A. Yes, sir.

Q. That is what I thought?

A. We had promised Mr. Brown to do that.

Q. You had promised Mr. Brown what?

A. I don't say we had promised, but we had stated to him that we would handle the matter and hoped that there would be no loss; but handle it in the best way possible, but if there was we would hold the company for it.

Q. You told Mr. Brown you would hold the company?

A. Yes.

Q. He didn't advise you how to handle it, did he?

A. No, sir.

Q. He didn't offer any suggestions as to that?

A. No, sir.

At this time counsel for plaintiff offers in evidence the deposition of Bela Singer, which is read to the jury as follows:

[Caption.]

Deposition of Bela Singer.

Q. What is your name, what is your business, how long have you been in such business?

A. My name is Bela Singer—my business is a merchant, and have been in business in Sydney for ten years.

Q. Did you know H. W. Baker & Co., of Seattle, Washington, if so, when did you know of them, and state, if in the month of October, 1891, your firm had any dealings with H. W. Baker & Co., concerning the ship "W. H. Lincoln" and a cargo of lumber?

A. I know the firm of H. W. Baker & Co. I knew them first in 1891. In the month of October, 1891, I had dealings with them concerning the ship "W. H. Lincoln" and the cargo of lumber.

Q. Please state if your house knew why the ship "Lincoln" was consigned to your house, if it was consigned by the said H. W. Baker & Co.? What was the cargo of the ship Lincoln, what kind of lumber was it, as known in the market, if it was lumber?

A. The cargo of the ship W. H. Lincoln was consigned by H. W. Baker & Co., to my house, and this was done on my personal advice to H. W. Baker & Co., while I was on a visit to America. The cargo was lumber and known in the market as Oregon lumber.

Q. Did you know when the said ship Lincoln started, if so, when were you advised that said ship Lincoln was consigned to you or your firm, either as buyers or brokers?

A. I received advice in New York from H. W. Baker & Co. early in the month of September, stating that the Lincoln had sailed for Sydney, and that they had advised my Sydney house. She was consigned to us as brokers.

Q. Did you or your firm in your behalf or any member or manager (if so who), of your knowledge, send a telegram or cablegram to H. W. Baker & Co., Seattle on October 1st, 1891, concerning the said cargo of the said ship Lincoln, or her lumber, if so, what was the telegram?

A. I knew nothing about any cablegram having been sent to H. W. Baker & Co., on October 1st, 1891, concerning the cargo of the ship W. H. Lincoln, until the 8th October, when I received a cable from my manager in Sydney stating that he had received no reply to the message of October 1st. I then telegraphed to H. W. Baker & Co., from New York, asking them why they had not answered and advising them to accept the offer.

Q. If you say it was addressed "Baker, Seattle, offered four pounds thousand cif advise accept market dull no outlet Singer," please state what such telegram or cablegram meant. Did you get any answer to such telegram or cablegram, or any member of your firm, if you say you did get an answer—state when it was and what was the answer?

A. I do not of my own knowledge know how the cablegram was addressed. If it was in the words "offered four pounds thousand cif advise accept market dull no outlet,"

it would mean that an offer had been made for the cargo at 4 pounds per thousand feet, cost, insurance and freight paid by the consignor and advising Baker & Co. to accept as the market was dull and there was no sale for lumber. I do not of my own knowledge know whether any answer was received to this cablegram .

Q. Referring especially to the name and address of the telegram or cablegram, October 1st, 1891, sent by you to Baker & Co. please state especially how was the telegram addressed, especially as to the words "Baker" or "Barker", if you say "Baker", over what lines did you send, and did you pay for its transmission?

A. I do not know of my own knowledge how this cablegram was addressed, or over what lines it was sent, or what was paid for its transmission.

Q. If answer had come from Baker accepting offer, as contained in your cablegram of October 1st, 1891, how much money gross would have been realized from the cargo of W. H. Lincoln, how much money net would have been subject to draft of H. W. Baker & Co. or their order, issuing from cargo of W. S. Lincoln?

A. If the offer, as contained in cablegram of October 1st, 1891, had been accepted, the cargo would have realized about six thousand pounds gross, and there would have been about two hundred pounds net over and above draft, and all expenses of commission freight &c. subject to the order of Baker & Co.

Q. To whom would the cargo of lumber have been disposed or sold, if acceptance of terms proposed in cablegram of October 1st, 1891, had arrived duly, or had been

made, what was the reasonable and ordinary price of such lumber and cargo of lumber as contained on ship W. H. Lincoln, what price would have been reasonably obtained according to the marketable demand for the said cargo of lumber, and who would have purchased the same, or to whom would the same have been sold by you?

A. The cargo of lumber would have been sold to Messrs. Clifford, Moore & Co., of Sydney, timber merchants, if terms proposed in cablegram of October 1st, 1891, had been accepted; of my own knowledge, I do not know what was the reasonable and ordinary price of such lumber as contained in the ship W. H. Lincoln in the month of October, 1891, as I was absent in America at the time. This also applies to the other questions contained in this interrogatory.

Q. What kind of lumber was in the ship W. H. Lincoln, at the time it was consigned to you, and at the time it reached you, what was the reasonable market price for such lumber in the market of Sydney on October 1st, 1891? What was the condition of the market after the 1st, continuing during October, and especially up to and on the 9th of October, 1891, and what was the condition of the market from the 9th of October to the 16th of October, 1891? Please state as to what difference there was from the demand and market, between the said dates from October 1st, 1891, continuing to October 16th, 1891? Please state if any efforts were made by you to dispose of the cargo of the ship "Lincoln" after October 1st, and if so, state whether these efforts were diligent and reasonable or what they were as to diligence?

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. If the cargo was eventually disposed of. Please state for what, when and to whom, simply giving amounts and names and in this question I inform you, you must add nothing more than the literal answer to the question, as your opinions of the reason are not material and not admissible at this time (nor of any collateral incidents affecting you only).

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. What would have been the difference in gross amount realized if the cargo sold according to your telegram October 1st, 1891, and the amount in gross realized at the time the said cargo was disposed of, what would have been the difference net from your place to Mr. Baker, or due to his draft or order from you should the sale of the cargo been made in accord with your telegram of October 1st, 1891, instead of the sale at the time it was made?

A. After an inspection of Messrs. Frazer & Co.'s account sales marked Exhibit "C," the difference in gross amount would have been nine hundred pounds in Baker & Co.'s favor. The difference in the net amount between Fraser & Co's account sales and the amount which would have been realized if sold according to our cable of October 1st, 1891, would have been about seventeen hundred pounds.

Q. On October 9th, 1891, please state if you received a telegram from Baker, concerning the cargo, or concern-

ing your telegram of October 1st, 1891; if so, have you that telegram, what was it, will you attach a copy of it here to your answer, did you receive another telegram from Baker concerning the said ship Lincoln or your telegram of October 1st, 1891, addressed to you by your cable name, if so what was that telegram, and would you attach a copy of it to your answer?

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. Please state, referring to your telegram of October 1st, 1891, how the address was spelled and how the same was addressed here to Seattle. Please state if previous to the said telegram of October 1st, 1891, you had sent other telegrams or cablegrams to Baker & Co., to Seattle upon the same subject of the said ship Lincoln and how they were addressed? State whether the word "Baker," Seattle, was your usual and customary mode of address to Baker & Co., Seattle? If so, please state if the said telegrams from your house were sent from Sydney over the same telegraphic line, what was the name of the cable used?

A. Owing to my absence in America, I am not in a position to give any information of my own knowledge as required in this interrogatory.

Q. Please state generally any advantage you know or benefit which would have enured or followed directly as a course of business to Mr. Baker or Baker & Co. if acceptance had been made of offer contained in your telegram of October 1st, 1891, and the cargo sold accordingly?

A. A great benefit would have resulted to Baker & Co. if the offer had been accepted as contained in cablegram of October 1st, 1891 and the cargo sold accordingly. There would have been very little loss to them, and they would have worked up a trade in this market. This was their first venture and they lost the benefit of the market through this sale not having been carried out.

Cross-Interrogatories.

Q. How many cable telegraph lines connect Sydney with other parts of the world?

A. I do not know.

Q. Over what telegraph cable line was the cablegram sent which is referred to in plaintiff's sixth interrogatory. If you personally sent the original of that despatch and now have the same or can obtain it identify it, append it hereto and make it a part of your deposition.

A. In the ordinary course of transmission, the cablegram which is referred to in the plaintiff's sixth interrogatory would have been sent over the Electric Telegraph Line of the Government of New South Wales. All cablegrams are transmitted by them, and there are no private cable companies in this colony. I did not personally send the original of that despatch, and the original cannot now be obtained, as in the ordinary course of business with the Electric Telegraph Department the original has been destroyed. All original cablegrams are destroyed by the department after a lapse of eighteen months. I have however obtained from the New South Wales Electric Telegraph Department a certified copy of the said cable-

gram which is appended hereto and marked with the letter "A."

(Signed) B. SINGER.

(Duly attested.)

Exhibit "A."

"Transmitted Form.

New South Wales Post and Telegraph Colonial and Inter-colonial lines.

Office Stamp. Telegram to Seattle Station,
Sent at h. m. Addressed to Baker.

Reference No.

No. of words 13.

Amount.

(Forwarded subject to the printed regulations of the Department, which may be seen at any Post and Telegraph Office in New South Wales.)

Offered four pounds thousand cif advise accept market dull no outlet.

Do not transmit.

Date 1st Octr. 91. (Signed) B. Singer & Co.

Time 2 h. 55 p m. Address 85 Clarence St."

Indorsed on face: "Ernest W. Perkins, Notary Public.

B. Singer."

Indorsed with stamp: "Postal and Tel Dep. Sydney, N. S. W., 1 Ap. 95."

Indorsed on back: "Certified copy, P. B. Warder, Secretary, Telegraph Service 1. 4. 95."

At this time, counsel for plaintiff offers in evidence the deposition of Rudolph Hamburger, which is read to the jury as follows:

[Caption.]

Deposition of Rudolph Hamburger.

Q. What is your name, what is your business, how long have you been in such business. What relation do you bear to B. Singer & Co.?

A. My name is Rudolph Hamburger. I am manager for B. Singer & Co. and have been in that position for about seven years.

Q. Did you know of H. W. Baker & Co. of Seattle, Washington, if so, when did you know of them and state if in month of October, 1891, your firm had any dealings with H. W. Baker & Co., concerning the ship W. H. Lincoln, and a cargo of lumber?

A. I knew of H. W. Baker & Co. of Seattle, Washington in the month of September, 1891. The ship W. H. Lincoln was consigned by H. W. Baker & Co. to the firm of B. Singer & Co. with a cargo of lumber.

Q. Please state if your house knew why the ship Lincoln was consigned to your house, if it was consigned by the said H. W. Baker & Co.? What was the cargo of the ship Lincoln, what kind of lumber was it, as known in the market, if it was lumber?

A. The ship W. H. Lincoln had been consigned to our house by the said H. W. Baker & Co. through the personal representations of Mr. Singer. The cargo consisted of

lumber and was known in the market as Oregon lumber.

Q. Did you know when the said ship Lincoln started, if so, when were you advised that said ship Lincoln was consigned to you or your firm, either as buyers or brokers?

A. The firm was advised by cable on the 7th of September of the dispatch of the Lincoln to our firm as brokers.

Q. Did you or your firm in your behalf, or any member or manager (if so, who?), of your knowledge, send a telegram or cablegram to H. W. Baker & Co., Seattle, on October 1st, 1891, concerning the said cargo of the said ship Lincoln, or her lumber, if so, what was that telegram?

A. I, as manager for the firm, sent a cable on the 1st October, 1891, to H. W. Baker & Co., in the words following: "Baker, Seattle. Offered four pounds thousand cif advise accept market dull no outlet." The signature "B. Singer & Co.," was not transmitted.

Q. If you say it was addressed Baker, Seattle, offered four pounds thousand cif advise accept market dull no outlet, Singer," please state what such telegram or cablegram meant. Did you get any answer to such telegram or cablegram, or any member of your firm, if you say you did get any answer, state when it was and what was the answer.

A. The cablegram was meant to convey that we had received an offer of four pounds per thousand feet cost, insurance and freight paid by consignor, and advising Baker & Co. to accept, as the market was dull and there was no sale for lumber. I did not get any answer to such cablegram nor any member of our firm or anyone else.

Q. Referring especially to the name and address of the telegram or cablegram October 1st, 1891, sent by you to Baker & Co., please state especially how was the telegram addressed, especially as to words "Baker" or "Barker," if you say "Baker" over what lines did you send and did you pay for its transmission?

A. The cablegram was addressed to "Baker," Seattle, and not "Barker." All cablegrams are dispatched over the lines of the government of New South Wales. I paid for the transmission of the cablegram the sum of three pounds, thirteen shillings and eight pence and obtained a receipt for the same, which receipt is appended hereto and marked with the letter "B."

Q. If answer had come from Baker accepting offer as contained in your cablegram of October 1st, 1891, how much money gross would have been realized from cargo of W. H. Lincoln; how much money net would have been subject to draft of H. W. Baker & Co. or their order, issuing from cargo of W. H. Lincoln?

A. About six thousand pounds gross would have been realized from the cargo, and there would have been about two hundred pounds net over and above the draft and all expenses of commission, freight, etc., subject to the order of Baker & Co.

Q. To whom would the cargo of lumber have been disposed or sold if acceptance of terms proposed in cablegram of October 1st, 1891, had arrived duly or had been made, what was the reasonable and ordinary price of such lumber and cargo of lumber, as contained in the ship W. H. Lincoln; what price would have been reasonably

obtained, according to the marketable demand for the said cargo of lumber, and who would have purchased the same, or to whom would the same have been sold by you?

A. The cargo would have been disposed of to Messrs. Clifford, Moore & Co., of Sydney, timber merchants. The reasonable and ordinary price of such lumber as contained in the ship "W. H. Lincoln" was from three pounds to three pounds ten per thousand feet cif. The reason why the offer of eight shillings had been made to us for this cargo by Clifford, Moore & Co. was that they had to supply a contract, and they had not sufficient of their own cargoes coming forward. We could not get any satisfactory offer for this cargo, although vigorous endeavors were made to dispose of the same.

Q. What kind of lumber was in the ship W. H. Lincoln at the time it was consigned to you and at the time it reached you; what was the reasonable market price for such lumber in the market at Sydney, on October 1st, 1891? What was the condition of the market after the first continuing during October, and especially up to and including the 9th of October, 1891, and what was the condition of the market from the 9th of October to the 16th of October, 1891? Please state as to what difference there was from the demand and market between said dates from October 1st, 1891, continuing to October 16th, 1891? Please state if any efforts were made by you to dispose of the cargo of the ship "Lincoln" after October 1st, and if so, state whether those efforts were diligent and reasonable or what they were as to diligence.

A. The lumber was Oregon pine lumber and the rea-

sonable market price for such lumber in the market at Sydney on October 1st, 1891, was three pounds to three pounds ten per thousand feet cif. The market was declining from the 1st of October up to the 9th of October, and throughout the whole of the rest of the month of October, and practically throughout the whole of the rest of the year. Between 1st October, 1891, up to October 16th, 1891, there was no demand for lumber of any kind, and the market was overstocked. We made all possible efforts to dispose of the cargo of the W. H. Lincoln after October 1st, and up to the 16th of October, but without success. On the 19th October, we received an offer from Clifford, Moore & Co. of 76.6 per thousand feet, of which we advised Baker & Co., but they would not accept.

Q. If the cargo was eventually disposed of, please state for what, when, and to whom, simply giving amounts and names, and in this question, I inform you, you must add nothing more than the literal answer to the question, as your opinions of the reason are not material and not admissible at this time (nor of any collateral incidents affecting you only).

A. I know that the cargo was eventually disposed of, but I do not know for what amount or who the persons were who became the purchasers.

Q. What would have been the difference in gross amount realized if the cargo sold according to your telegram of October 1st, 1891, and the amount in gross realized at the time the said cargo was disposed of; what would be the difference net from your place to Mr. Baker, or due to his draft or order from you should the sale

of the cargo been made in accord with your telegram of October 1st, 1891, instead of the sale at the time it was made?

A. After an inspection of Fraser & Co.'s account sales marked Exhibit "C," the difference in gross amount would have been 9 hundred pounds in Baker & Co's favor. The difference in the net amount between Fraser & Co.'s account sales and the amount which would have been realized if sold according to our cable of October 1st, 1891, would have been fully seventeen hundred pounds.

Q. On October 9th, 1891, please state if you received a telegram from Baker concerning the cargo or concerning your telegram of October 1st, 1891; if so, have you that telegram; what was it; will you attach a copy of it here to your answer; did you receive another telegram from Baker concerning the said ship Lincoln, or your telegram of October 1st, 1891, addressed to you by your cable name, if so, what was that telegram, and would you attach a copy of it to your answer?

A. I received a cablegram, dated 9th October, 1891, on 10th October, in the words following: "Message delayed, wire conditions and offerings today." I have not that cablegram now, and am therefore unable to attach a copy of it to this answer. On the 17th of October, 1891, I received another cablegram from Baker in the words following: "What conditions market; what offers"? I have not that telegram now, and am therefore unable to attach a copy of it to this answer.

Q. Please state, referring to your telegram of October 1st, 1891, how the address was spelled and how the same

was addressed here to Seattle. Please state if previous to the said telegram of October 1st, 1891, you had sent other telegrams or cablegrams to Baker & Co., to Seattle, upon the same subject of the said ship Lincoln and how they were addressed? State whether the word "Baker," Seattle, was your usual and customary mode of address to Baker & Co., Seattle? If so, please state if the said telegrams from your house were sent from Sydney over the same telegraphic lines; what was the name of the cable used?

A. The cablegram of October 1st, 1891, was addressed to "Baker, Seattle." A copy of the said telegram, as certified by Mr. P. B. Walker, the secretary of the Telegraph Service of the government of New South Wales is appended to the depositions of Mr. Bela Singer and marked with the letter "A." On the 18th September, 1891, I sent a telegram to H. W. Baker & Co., addressed in the same way. That was the only one prior to that of the 1st of October. We always addressed Baker & Co., Seattle, as "Baker, Seattle." I am unable to state what telegraphic lines these cables were sent over. They were sent in the usual way through the government of New South Wales, who receive and dispatch all cablegrams. There are no private cable companies in New South Wales.

Q. Please state generally any advantage you know or benefit which would have inured or followed directly as a course of business to Mr. Baker or Baker & Co., if acceptance had been made of offer contained in your telegram of October 1st, 1891, and the cargo sold accordingly?

A. A great benefit would have resulted to Baker & Co. if the offer had been accepted, as contained in cablegram of October 1st, 1891, and the cargo sold accordingly. There would have been very little loss to them and they would have worked up a trade in this market. This was their first venture and they lost the benefit of the market through the sale not having been carried out.

Cross Interrogatories.

Q. How many cable telegraph lines connect Sydney with the other parts of the world?

A. I do not know.

Q. Over what telegraph cable line was the cablegram sent which is referred to in plaintiff's sixth interrogatory? If you personally sent the original of that dispatch and now have the same or can obtain it, identify it, append it hereto and make it a part of your deposition?

A. In the ordinary course of transmission, the cablegram which is referred to in plaintiff's sixth interrogatory would have been sent over the Electric Telegraph Lines of the government of New South Wales. All cablegrams are transmitted by them and there are no private cable companies in New South Wales. The said cablegram was dispatched by me, and a certified copy of the said cablegram is appended to the depositions of Mr. Bela Singer and marked with the letter "A."

(Signed) R. HAMBURGER.

(Duly attested.)

Exhibit "B."

"Electric Telegraph Department."

Chief Office, Sydney.

Received from B. Singer & Co., the sum of three pounds, thirteen shillings and eight pence, cablegram of thirteen words to Seattle. S. W. Milne, Receiving Clerk.

R. HAMBURGER."

£3, 13.8.

Indorsed on face:

"ERNEST W. PERKINS,
Notary Public."

Stamped on face:

"Elec. Tel. Dept. 1 Oct., '91. Sydney, N. S. W."

At this time counsel for plaintiff offers in evidence the deposition of Albert Elkington, which is read to the jury as follows:

[Caption.]

Deposition of Albert Elkington.

Q. What is your name? Where do you reside? Do you know the firm of B. Singer & Co.? Did you know the ship W. II. Lincoln? Did you know her cargo in October, 1891, and if so, simply answer yes, stating the date (how you came to know, etc., you cannot here state; it is immaterial)?

A. My name is Albert Elkington. I reside at Wharf Road, Snails Bay, Balmain, and my business address is City Mart, 359 George Street, Sydney, and I am the manager of the firm of Fraser & Co. I know the firm of B. Singer & Co. I knew the ship *W. H. Lincoln* and also her cargo in October, 1891, after arrival from the port of Tacoma, in Washington Territory.

Q. Did you know what was the usual and ordinary and reasonable market price for lumber such as comprised the cargo of the ship *W. H. Lincoln* on October 1st, 1891; if so, what was it per thousand on October 9th, 1891, what was it per thousand on October 16th, 1891; if you know what it was per thousand?

A. I know what was the usual and ordinary market price for lumber such as comprised the cargo of the ship "*W. H. Lincoln*" on October 1st, 1891. Throughout the month of October, 1891, lumber of the description comprised in this cargo was worth five pounds five shillings per thousand feet duty paid, average value. That was about the price throughout the whole of the month of October, 1891.

Q. If you know when the cargo was sold, simply state yes, and the date, and if you are the person who sold it, please state what was the amount, if the cargo only, that is, what was the amount the cargo brought separate from other things; is that amount gross?

A. The cargo was sold on various dates between the months of November, 1891, and February, 1892. I was the salesman and the total gross amount realized for the sale of the cargo was fifteen hundred forty-seven pounds,

three, three, as shown by the copy account sales appended hereto and marked with the letter "C."

Q. What is the business of Messrs. Fraser & Co., of which you are manager; please give the figures required herein with such accuracy as your judgment will permit, actual figures are not required in these answers?

A. The business of Messrs. Fraser & Co., of which I am manager and salesman, is that of mercantile auctioneers, and it was in the ordinary course of their business that this sale was carried out.

(Signed)

A. ELKINGTON.

(Duly attested.)

Exhibit "C."

Sydney, —, 18—

Account sales of timber sold by Fraser & Co. at auction by order and for account of the Bank of New Zealand.

Ex. W. H. Lincoln.

Summary:

1892		Gross.		Charges.		Net.
Febry 2 192	Bolls laths, badly burnt.....	n 6		7 2		5 12 10
"	Lumber, badly burnt..	66		3 19 2		62 10
"	do and laths handled prior to fire.....	3885	9 9	247 13 7		3637 16 2
"	Lumber and laths handled after the fire...	1189	13 6	78 6 7		1111 6 11
				<hr/>		<hr/>
		£147	3 3	330 6 6		4816 16 9
	Net proceeds as above.....					4816 16 9

Less disbursements as under

Cash paid for freight, incl. 2 days'

demurrage..... 3296 6 6

Cash paid for duty..... 838 11 8

" " " wharfage 161 5 3

" " " landing, stackage, delivering and watching, per

I. A Curtis' account..... 310 9

Cash paid for fire insurance.... 5 11 3

" " " survey fees 5 5

" " " consul's fees..... 2 2

" " " attendance at surveys and general agency.... 15 15

4635 5 8

Net amount realized after paying all charges.....£ 181 11 1

ERNEST W. PERKINS,

[Signed] A. ELKINGTON.

Notary Public.¶

H. W. BAKER, recalled in his own behalf, testified as follows:

By Mr. GILMAN.—Q. In the testimony of Mr. Hamburger and Mr. Singer it appears if you had made that sale of four pounds a thousand “c. i. f.,” that you would have realized two hundred pounds net over and above the amount of the draft. What was the amount of the draft?

A. Seventy-two or three hundred dollars.

Q. Also in the deposition of Mr. Hamburger it appears that he sent you a cablegram on the 18th of September. Have you been able to find that cablegram?

A. No, sir.

Q. Have you made search for it?

A. I have not this time. I could not find it at the former trial.

Q. Do you recollect what line it came over?

A. It came over the Western Union Telegraph Company. All our cables did from there.

Q. Can you give substantially the language of it?

A. He told us in that cable that the market was depressed and, I think, said that there was considerable on the way—he gave us to understand that.

Q. I will ask you if this was the language: “Lumber market depressed. Too many shipments coming”?

A. Yes, sir.

Q. How was that addressed to you?

A. That was addressed “Baker, Seattle.”

Cross-Examination.

By Mr. BURLEIGH.—Q. Mr. Baker, you said in your testimony a while ago something about addressing your telegrams to “Ritual,” Sydney. What did “Ritual” mean?

A. Ritual is B. Singer & Co.

Q. Explain to the jury how Ritual is B. Singer & Co., and why it is?

A. That was their cable address and was probably registered in Sydney. Possibly, the government line out of Sydney registered it with the lines out of this country.

Q. That was an arrangement between B. Singer & Co. and the telegraph company by which any messages that came addressed “Ritual” would be delivered to them?

A. That is customary that a concern has a registered cable address if they have a long name they will have it registered—it saves expense.

Q. The object of it is to abbreviate the words?

A. That is it.

Q. Did you have your address registered with the Western Union Telegraph Company?

A. I don't think we did. I could not say positively. My impression is that we did not—that is as a cable address.

Q. Did you have with the Postal Telegraph Company?

A. I think not.

Q. What was the name of your firm?

A. H. W. Baker & Co.

Q. Do you know what the Australian duty was on lumber at the time you made this shipment?

A. Yes, sir; it was one shilling and sixpence.

Q. A thousand feet?

A. No, sir; that is per hundred superficial feet.

Q. How much was it a thousand?

A. That would be fifteen shillings a thousand.

Redirect Examination.

By Mr. GILMAN.—Q. Mr. Baker, I want to ask you the difference in commercial transaction between the sale of an article c. i. f. and a sale duty paid, having special reference to the Australian market?

A. A sale c. i. f. would be a sale either en route, afloat in case of a cargo matter, or a sale immediately on arrival before any discharging had taken place or demurrage had been incurred, etc. The sale is possible up to the time of the arrival of the ship and for say twenty-four hours afterwards if her demurrage does not begin till after that. The expression "sale, price duty paid," would mean that cargo landed with the costs added to it would be made up of the original cost of the cargo or the selling price of it and the marine insurance on the way, the freight on the way, land charges, consul fees, and wharfage, whatever it was, and the duty which would be paid after the discharge of the cargo before it would be available for delivery on the sale.

Q. Do you know what is the difference per thousand

on the Sydney market between the sale of lumber duty paid and a sale c. i. f.?

A. Well, it runs about two pounds in Sydney or a little over.

Testimony of witness closed.

It is admitted by counsel for defendant that the claim which is the basis of this suit has not been paid.

Here the plaintiff rests.

Counsel for defendant now offers in evidence the deposition of G. R. Mockridge, taken before Wellington Dale, a notary public at Penzance, Cornwall, England, which deposition is read to the jury as follows:

Deposition of G. R. Mockridge.

Q. What is your name, age, occupation, and place of residence?

A. George Robert Mockridge, 39 years of age. Superintendent of the Western Union Telegraph Company at Penzance, and I reside at Trewithen Road, Penzance.

Q. What, if any position did you hold in the employ of the defendant, the Western Union Telegraph Company, on October 1st 1891, and where were you so employed?

A. Superintendent and I was then employed at Penzance.

Q. If you answer the second interrogatory that you were on said day employed in conducting the defendant's business at Penzance, in the capacity you mention, you may state how long you held such position at Penzance

prior to October 1st, and whether you have held it since, and if so, to what time?

A. Just over 10 years prior to 1st of October last, and since that time to the present date.

Q. Do you know what person or company was operating the telegraph cable line from Penzance to New York on October 1st, 1891?

A. Yes.

Q. If you answer the fourth interrogatory in the affirmative you may state who the person or company was?

A. The Western Union Telegraph Company.

Q. If, in answer to the fifth interrogatory, you say it was the defendant, the Western Union Telegraph Company, you may state if the defendant company received at Penzance, from Sydney, Australia, on the 1st day of October, 1891, a message for transmission, by it to Seattle, Washington, addressed to "Barker" or "Baker"?

Counsel for plaintiff objects to the question on the ground that the witness is not competent to answer unless the question is clearly intended for the purpose of showing that the files of the office showed a telegram on file addressed in the manner indicated in the question.

The COURT.—I will overrule the objection, the testimony is material as a connecting link in the case. I do not think that the witness is competent to prove that the message was addressed one way or the other, or what the contents of the message was at the time it was received, but it may, in connection with other testimony, show what the fact was.

A. The Western Union Company did receive at Pen-

zance from Sydney, Australia, on 1st day of October, 1891, a message for transmission by it to Seattle, addressed to "Barker."

Counsel for plaintiff moves to strike out the answer on the same grounds stated in the objection to the question, and for the reason that the answer shows that the message, instead of being received from Sydney, New South Wales, was received by the Western Union Telegraph Company over a line of which they were joint lessees with the Eastern Cable Company from Porthcurno, their own office.

The COURT.—If there was an error in the delivery of the message from Porthcurno to Penzance, it would be a matter of proof, as to whether the error was on the part of the operator transmitting or the operator in taking it off and receiving the message, and it is on that theory that I admitted the previous answer, and on that theory, I will overrule this objection and allow this telegram to be admitted, subject to connecting proof. I think it is of some importance in the chain of circumstances to be shown in the case, what the message was that was taken off the wires at Penzance, but it is not of itself testimony that the error was committed at the other end of the line and does not show that the error was committed at one end of the line or the other.

Mr. BURLEIGH.—We take the position that the Western Union Telegraph Company did not become responsible for that message until it received it, and the party who delivers a telegram to a telegraph company is bound to see that it is properly delivered.

The COURT.—I differ with you about that. If the fault of delivery was on the part of the operator in receiving the message, that he was careless and wrote the name “Baker” so that he or another in the same office afterwards took it to be ‘Barker,’ I think the fault would lie right there.

Mr. BURLEIGH.—But the burden of proving that the fault was on the Western Union Company’s operator is on the plaintiff.

The COURT.—You are making your defense, and I will allow you to introduce this testimony, but at the same time, I do it guardedly, so as not to deceive you or the other side. I will not let it go to the jury as proof of that fact.

Q. If you answer the sixth interrogatory in the affirmative, you may state what person or telegraph company delivered said message to the defendant for such transmission?

A. The Eastern Telegraph Company delivered by wire from their Porthurno station the said message to the said Western Union Telegraph Company for such transmission.

Q. If you answer the last interrogatory that it was the Eastern Telegraph Company, you may state if you know whether that company operated a telegraph company between Sydney and Penzance?

A. The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Q. Do you know whether the defendant the Western Union Telegraph Company was on the 1st day of October,

1891, the owner or lessee of, or was operating, the telegraph line over which said message came from Sydney to Penzance?

A. The Western Union Telegraph Company was on 1st day of October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno, in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and Porthcurno in conjunction with the said Eastern Telegraph Company.

Q. If you answer the ninth interrogatory in affirmative, you may state whether on the 1st day of October, 1891, the defendant, the Western Union Telegraph Company, was the owner, lessee of, or was operating said line on said date or when said message was transmitted over the same?

A. See my reply to the ninth interrogatory.

Q. 11. If you have the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it, and cause it to be annexed to your deposition, and marked "Exhibit A."

A. I produce the said original message delivered by the Eastern Telegraph Company to the Western Tele-

graph Company on October 1st, 1891, and it is annexed to this deposition and marked "Exhibit A."

Counsel for defendant now offers in evidence the telegram referred to by the witness, in connection with the deposition.

Counsel for plaintiff objects on the same grounds urged in the last objection.

The COURT.—I will let it go in with the same limitations I have already made.

Telegram received in evidence and marked "Defendant's Exhibit A," attached to deposition of G. R. Mockridge, and reads as follows:

Defendant's Exhibit "A."

"Western Union Telegraph Company, lessees of The American Telegraph & Cable Company. Penzance Station. From Sydney Station to Barker, Seattle.

Offered four pounds thousand cif. advise accept market dull no outlet."

Said telegram is also indorsed upon its face as follows: "1 Oct., '91." And farther down: "This is the exhibit A mentioned in the eleventh interrogatory and answer thereto by George Robert Mockridge of the annexed interrogatories and answers and signed by the said George Robert Mockridge. 18th Novr., 1893. Wellington Dale, Notary Public."

Q. 12. Was any message received by the Western Union Telegraph Company, on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to "Baker," Seattle, and reading: "Offered four pounds thousand cif advise accept market dull no outlet."

A. No.

Q. 13. State whether, on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant the Western Union Telegraph Company from Penzance to New York, and if so, on what day the same was transmitted.

A. The message referred to in the sixth interrogatory, addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891.

Q. 14. Was the defendant at any time, to your knowledge, informed that the message "Exhibit A" was for "Baker" and not "Barker," Seattle? If so, when, where and by whom was such information given?

A. The defendant was informed that the message, "Exhibit A," was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance, by wire received from the Eastern Telegraph Company from their Porthcurno station.

Q. If you answer the fourteenth interrogatory in the affirmative, was such information in writing? If yea, and you have such writing, you will produce it, and deliver it to the officer taking your deposition identify it and cause it to be annexed to your deposition and marked "Exhibit B."

A. I produce the wire writing received, and it is annexed to this, my deposition, and marked "Exhibit B."

Q. 16. Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked "Exhibit A" addressed either to "Barker" or "Baker"?

A. No.

Cross-Interrogatories and Answers.

Q. 1. You are working you say for the Western Union Telegraph Company of the United States, or that you were on October 1st, 1891?

A. Yes.

Q. 2. Do you say that a message came over the wire addressed "Baker Seattle, Washington. Offered four pounds thousand cif advise accept market dull no outlet." If so, did you receive this message. If you did not receive this message yourself, who did? Did you transmit it to New York? If you did not, who did? If you did not transmit this message yourself, how did you know its contents? Why will you swear that it said: "Offered four pounds thousand"? Did it not say: "Offered fourteen pounds thousand"? Are you sure that the message was simply "Baker, Seattle, offered four pounds thousand," and not fourteen pounds? Why are you sure, if you say you are, that it was only four pounds instead of fourteen?

A. I do not say that a message came over the wire addressed "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet." I did

not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to "Barker, Seattle," did say: "Offered four pounds thousand." It did not say "offered fourteen pounds thousand." I am sure that the message was "Barker, Seattle," offered four pounds thousand cif, advise accept market dull no outlet," and not "Baker, Seattle, offered four pounds thousand," and not "fourteen pounds." I am so sure because I have seen and have now before me the original message itself.

Q. Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message, did you transmit it from your office—that is, the Western Union Telegraph Company's office—for which you are acting, "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet"?

A. We did transmit the message as it was received. I admit that we did transmit the message. The message was transmitted from the Western Union Telegraph Company's office for which I am acting, as follows: "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet."

Q. 4. How do you know what arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance? Did you make this arrangement? Do you know if they had any arrangement at all? When did the Western Union Telegraph Company become

the owner of said line? Or, if you say they only leased it, when was it they leased it? What is your position? How do you know anything about the leasing and the owning of these lines? Are you president, secretary, or manager? Do you sign the papers for this company and make their contracts? If you say yes, state who gave you this authority and when you got it. Was it yourself who signed the lease leasing this line? Who signed the indenture when this line was bought by the Western Union Telegraph Company?

A. I do not know of any arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance beyond what is stated in my replies to the eighth and ninth interrogatories. I know of the arrangements on the line between Penzance and Porthcurno, because of our using such line, but I do not know of any arrangements on the line between Penzance and Sydney. The Western Union Telegraph Company did not become owner of said line. They leased the line between Penzance and Porthcurno as aforesaid, about eight years ago. I am superintendent. I know nothing about the leasing and owning of these lines except that we work over the line between Penzance and Porthcurno and not beyond. I am neither president, secretary, nor manager. I do not sign the papers for this company or make their contracts. I did not sign the lease, and I do not know of any such indenture being signed.

Q. 5. Is the message, called original message, which you have attached to your direct interrogatory, known as eleven, the message you received? What change has been

made in it since it was received? Do you say that you have sent the original message out of the office and attached it to this interrogatory? If so, by what authority have you sent the original message from your office? Who told you to do it? Is it not true that you have made a copy of it, as you felt it was your duty, and attached the copy, instead of sending the original message, the official paper out of your office here to the city of Seattle, in the state of Washington, United States of America?

A. The said original message is not known as eleven, but is known as number seven and is the message I received. There has been no change made in it since it was received. I do not say that I have sent the original message out of the office and attached it to this interrogatory. By the original message, I mean the message as received at our office at Penzance and not the message as written by the sender at Sydney. I sent the original message by the authority of the London representative of the Western Union Telegraph Company. The said London representative told us to do it. It is not true that I made a copy of it and attached a copy instead of sending the original message, the original message itself was sent.

Q. 6. Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule in your office to destroy these original messages every six months from the date they are received? Is it not true that pursuant to this rule this message, with all other messages, was destroyed? If not—if you say it is not so, why was it that you kept this one message? Is it not true that the message as

attached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

A. I have not destroyed the original message received in this case. It is not true that we have a rule in our office to destroy these original messages every six months from the date they are received. It is not true that this message, with all other messages, was destroyed in pursuance to any rule. This one message was kept in the usual way with the other messages. It is not true that the message attached is not the original message, as the original message is the one attached hereto; it has not been destroyed. The message attached has not been prepared.

Q. 7. Who have you consulted before you have given your testimony here concerning your testimony? What matters were you told to testify and what matters were you told to omit? Have you consulted the solicitor of the company at your place, or its barrister? Did any general manager of your company or person acting for it, consult with you concerning your testimony? If so, what was said to you? Have you received any letters from the general solicitor of your company or any other solicitors advising you what your testimony should be, or the nature of it, or the manner of it, or what it was to be directed to or what not, or explaining to you these interrogatories, or any part of them, or any portion of them, or what to do concerning any of them? If so, from whom were these communications received and when did you receive them?

Have you been advised not to speak of these communications? *

A. I have consulted no one before giving my testimony, concerning such testimony. I was not told to testify to anything nor was I told to omit anything. I have not consulted the solicitor to the company at my place, nor its barrister. No general manager of my company nor any person acting for such company consulted me concerning my testimony. I have received one letter only and that from the general solicitor of my company, and such letter did not advise me what my testimony should be or the nature of it or the manner of it, but such letter did point out to what my testimony should be directed. Such letter further explained that I should take the interrogatories before a notary and reply to them. This communication was received by me from George H. Fears on the 9th day of November, 1893. I have not been advised not to speak of this communication.

Q. S. If you say you received no such communications do you now say so for the reason that you are now so advised to say? If you say it is not so—that you have not been so advised, then why do you say you have not received such communications, if you say so?

A. I say again that the only communication which I have received is the letter mentioned in my reply to the last cross-interrogatory.

(Signed) G. R. MOCKRIDGE.

(Duly attested.)

Exhibit "B."

The Western Union Telegraph Company, Lessees of the
American Telegraph and Cable Company.

Recd from	Sent or handed to	P. K.
Time 6 3 p. m.	Time 6 0 p. m.	
Clerk C	Clerk P.	
To 7 P. K.	W. U. Tel Co. 9 Oct. 91	Penzance.

Fm Seattle, Wn. 7 1st Baker Seattle Deld."

Indorsed on face: "This is the exhibit 'B' mentioned in the fifteenth interrogatory and answers thereto by George Robert Mockridge. Wellington Dale, Notary Public. G. R. Mockridge."

(Same formal heading.)

Recd from	Sent or handed to	P. K.
Time 5 34 a. m.	Time 5 50 a. m.	
Clerk B	Clerk B	
To P. K.	W. U. Tel Co. 9 Oct. 91	Penzance.

From NY from Seattle Wn. 7 1st Barker Seattle and unk ret'd by Barker first Natl bank not for him."

Indorsed on face: (Same as above.)

(Same formal heading.)

Recd from P. K.	Sent or handed to	C.
Time 2 12 p. m.	Time 2 19 p. m.	
Clerk P	Clerk Luff	
To 16 C	W. U. Tel Co. 9 Oct. 91	Penzance

Fm East our 7-1 Is to Baker Seattle pse say if still undeld. P.

Indorsed on face: (Same as above.)

Counsel for defendant now offers in evidence the deposition of Edward Chambers, taken before Wellington Dale, a notary public at Penzance, Cornwall, England, which is read to the jury as follows:

Deposition of Edward Chambers.

Q. 1. What is your name, age, occupation, and place of residence?

A. My name is Edward Chambers, and I am the manager of the Penzance office of the Western Union Telegraph Company and reside at Alverton Lodge, Penzance, and am 42 years of age.

Q. 2. What position, if any, did you hold in the employ of the defendant the Western Union Telegraph Company, on October 1st, 1891, and where were you so employed?

A. On the 1st October, 1891, I was manager of the Penzance office of the Western Union Telegraph Company, and I was then employed at Penzance.

Q. 3. If you answer the second interrogatory that you were on said day employed in conducting the defendant's business at Penzance, in the capacity you mention, you may state how long you held such position at Penzance prior to October 1st, and whether you have held it since, and if so, to what time?

A. I held the position of manager of the said Penzance office for about seven years prior to 1st October, 1891, and have held it since that time and still hold it.

Q. 4. Do you know what person or company was operating the telegraph cable line from Penzance to New York on October 1st, 1891?

A. Yes.

Q. 5. If you answer the fourth interrogatory in the affirmative, you may state who the person or company was?

A. The Western Union Telegraph Company.

Q. 6. If in answer to the fifth interrogatory you say it was the defendant, the Western Union Telegraph Company, you may state if the defendant company received at Penzance, from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, Washington, addressed to "Barker" or "Baker"?

A. The Western Union Telegraph Company received at Penzance from Sydney Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, addressed to "Barker."

Q. If you answer the sixth interrogatory in the affirmative, you may state what person or telegraph company delivered said message to the defendant for transmission?

A. The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Q. 8. If you answer the seventh interrogatory that it was the Eastern Telegraph Company, you may state if you know whether that company operated a telegraph line between Sydney and Penzance?

A. The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Q. 9. Do you know whether the defendant, the Western Union Telegraph Company was on the 1st day of October, 1891, the owner or lessee of, or was operating the telegraph line over which said message came from Sydney to Penzance?

A. The Western Union Telegraph Company was, on the 1st October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno, in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and Porthcurno in conjunction with the said Eastern Telegraph Company.

Q. 10. If you answer the 9th interrogatory in the af-

firmative, you may state whether on the 1st day of October, 1891, the defendant, the Western Union Telegraph Company, was the owner, lessee of, or was operating said line on said date, or when said message was transmitted over the same?

A. See my reply to the last interrogatory.

Q. If you have the original message, delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked "Exhibit A."

A. I have not the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, but it is now produced to me, marked Exhibit "A," and annexed to the depositions of George Robert Mockridge, made herein this day.

Q. 12. Was any message received by the Western Union Telegraph Company on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to "Baker, Seattle," and reading, "Offered four pounds thousand cif advise accept market dull no outlet"?

A. No message was received by the Western Union Telegraph Company on October 1st, 1891, at Penzance from Sydney, Australia, addressed to "Baker," Seattle, and reading, "Offered four pounds thousand cif advise accept market dull no outlet."

Q. 13. State whether on the 1st day of October, 1891,

the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company from Penzance to New York, and if so, on what day the same was so transmitted?

A. The message referred to in the sixth interrogatory addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on the 1st day of October, 1891.

Q. 14. Was the defendant at any time, to your knowledge, informed that the message "Exhibit A," was for "Baker," and not "Barker," Seattle? If so, when, where and by whom was such information given?

A. The defendant was informed that the said message "Exhibit A" to the deposition of the said George Robert Mockridge was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance, by wire received from the Eastern Telegraph Company from the Porthcurno station.

Q. 15. If you answer the fourteenth interrogatory in the affirmative, was such information in writing? If yea, and you have such writing, you will produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked "Exhibit B."

A. The information was by wire and is annexed to the said deposition of the George Robert Mockridge, marked "Exhibit B" and now produced to me.

Q. 16. Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891,

than the message marked "Exhibit A," addressed either to "Barker" or "Baker"?

A. No.

Q. 17. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer?

A. No.

Cross Interrogatories and Answers.

Q. 1. You are working you say for the Western Union Telegraph Company of the United States or that you were on October 1st, 1891?

A. Yes.

Q. 2. Do you say that a message came over the wire addressed "Baker, Seattle, Washington. Offered four pounds thousand cif advise accept market dull no outlet." If so, did you receive this message? If you did not receive this message yourself, who did? Did you transmit it to New York? If you did not, who did? If you did not transmit this message yourself, how did you know its contents? Why will you swear that it said "Offered four pounds thousand?" Did it not say "Offered fourteen pounds thousand?" Are you sure that the message was simply "Baker, Seattle, offered four pounds thousand," and not fourteen pounds? Why are you sure, if you say you are that it was only four pounds instead of fourteen?

A. I do not say that a message came over the wire ad-

dressed, "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet." I did not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received, addressed to "Baker," Seattle, did say offered "four pounds thousand." It did not say "Offered fourteen pounds thousand." I am sure that the message was "Barker Seattle, offered four pounds thousand cif advise accept market dull no outlet" and not "Baker, Seattle, offered four pounds thousand" and not "fourteen pounds." I am so sure because I have seen and have now before me the original message itself, being Exhibit "A" above referred to. By the words "Original message" I mean the message as received by our company at Penzance.

Q. 3. Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message, did you transmit it from your office—that is the Western Union Telegraph Company's office—for which you are acting, "Barker, Seattle. Offered four pounds thousand cif advise accept, market dull no outlet."

A. I did not transmit the said message personally, but I know that such message was transmitted by our office as received and as follows: "Barker, Seattle, offered four pounds thousand cif advise market dull no outlet."

Q. 4. How do you know what arrangements the Western Union Telegraph Company had with the line from

Sydney to Penzance? Did you make this arrangement? Do you know if they had any arrangement at all? When did the Western Union Telegraph Company become the owner of said line? Or if you say they only leased it, when was it they leased it? What is your position? How do you know anything about the leasing and owning of these lines? Are you president, secretary, or manager? Do you sign the papers for this company and make their contracts? If you say yes, state who gave you this authority and when you got it? Was it yourself who signed the lease leasing this line? Who signed the indenture when this line was bought by the Western Union Telegraph Company?

A. I do not know of any arrangements which the Western Union Telegraph Company had with the line from Sydney to Penzance. I made no arrangement. I only know of the arrangement on the line between Penzance and Porthcurno, because of our using such line, but I do not know of any arrangement on the line between Penzance and Sydney. The Western Union Telegraph Company did not become owner of said line. They leased the line between Penzance and Porthcurno as aforesaid in conjunction with the Eastern Telegraph Company. I am manager of the office at Penzance. I do not know about the leasing and owning of the lines, except that we work over the line between Penzance and Porthcurno and not beyond. I am not president or secretary, but am manager of the Penzance office. I do not sign the papers for this company and make their contracts. I did not sign any lease. I do not know of any indenture

by which the Western Union Telegraph Company bought this line.

Q. 5. Is the message, called original message, which you have attached to your direct interrogatory, known as eleven, the message you received? What change has been made in it since it was received. Do you say that you have sent the original message out of the office and attached it to this interrogatory? If so, by what authority have you sent the original message from your office? Who told you to do it? Is it not true that you have made a copy of it as you felt it was your duty and attached the copy instead of sending the original message, the official paper out of your office here to the city of Seattle, in the State of Washington, United States of America?

A. The message called original message marked Exhibit "A" and annexed to the deposition of the said George Robert Mockridge is not known as eleven, but as number seven and is the message received. There has been no change in it since it was received. I did not send the original message out of the office. The said George Robert Mockridge did and attached it to his interrogatory. The original message is attached to the depositions and not a copy thereof.

Q. 6. Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule in your office to destroy these original messages every six months from the date they are received. Is it not true that, pursuant to this rule, this message, with all other messages, was destroyed? If not—if you say it is not so—why was it that you kept this one message? Is it not true that the message as at-

tached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

A. I have not destroyed the original message received in this case. It is not true that there is a rule in our office to destroy these original messages every six months from the date they are received. It is not true that pursuant to any rule this message with all other messages was destroyed. This message was kept in the same way as other messages. It is not true that the message as attached is not the original message and that the original message has been destroyed, because the original message has not been destroyed, but is attached as already stated and the message attached is not one which has been prepared.

Q. 7. Who have you consulted before you have given your testimony here concerning your testimony? What matters were you told to testify and what matters were you told to omit? Have you consulted the solicitor of the company at your place or its barrister? Did any general manager of your company or person acting for it consult with you concerning your testimony? If so, what was said to you? Have you received any letters from the general solicitor of your company or any other solicitors, advising you what your testimony should be, or the nature of it, or the manner of it, or what it was to be directed to or what not, or explaining to you these interrogatories, or any part of them or any portion of them or what to do concerning any of them? If so, from whom were these communications re-

ceived and when did you receive them? Have you been advised not to speak of these communications?

A. I have consulted no one, before giving my testimony here, concerning such testimony. I was not told to testify to any matter, neither was I told to omit any matter. I have not consulted the solicitor to the company at my place or its barrister. No general manager of our company or person acting for it consulted with me concerning my testimony, unless it can be said that the action of my superintendent, the said George Robert Mockridge informing me that I had to answer these interrogatories can be called consulting me. I have not received any letters from the general solicitor of the company or any other solicitor advising me what my testimony should be or the nature of it or the manner of it or what it was to be directed or what not or explaining to me these interrogatories or any part of them or any portion of them, or what to do concerning any of them. I have not been advised not to speak of any communication because I have received none.

Q. 8. If you say you received no such communications, do you now say so for the reason that you are advised so to say? If you say it is not so—that you have not been so advised, then why do you say you have not received such communications, if you so say?

A. I do not say that I have received no communication because I have been advised so to say. I say that I have not received such communication because I have not.

(Signed) EDWARD CHAMBERS.

(Duly attested.)

Counsel for defendant next offers in evidence the deposition of Michael J. O'Leary, which is read to the jury as follows:

[Caption.]

Deposition of Michael J. O'Leary.

Michael J. O'Leary, a witness called on behalf of defendant herein, and residing at the city of Brooklyn, New York more than one hundred miles from the place where this cause is to be tried being duly sworn to tell the truth, the whole truth and nothing but the truth, and being examined upon the interrogatories hereto attached, deposed and said as follows:

Q. 1. What is your name, age, occupation, and where do you reside?

A. My name is Michael J. O'Leary age 38, occupation chief clerk, Cable Message Bureau, Western Union Telegraph Company, New York, and I reside at 549 Pacific Street, Brooklyn, New York.

Q. 2. Were you in the employ of the defendant on October 1st, 1891, and if so, where, and in what capacity were you so employed?

A. Yes, as chief clerk Cable Message Bureau, in the Cable Bureau, New York City.

Q. 3. If you answer the second interrogatory that you were on that day in the employ of the defendant at its Ocean cable office in New York you may state how long you had been employed in its said office prior to and since October 1st, 1891.

A. Have been employed in that position continuously from 1884 to the present time in New York city.

Q. 4. Do you know if the defendant received at its Ocean cable office in New York, on the 1st day of October, 1891, a message for transmission by it to Seattle, Washington, addressed to "Barker" or "Baker," Seattle?

A. Yes, I know that the Western Union Telegraph Company received at its ocean cable office in New York City on October 1st, 1891 a cable message addressed "Barker," "Seattle." It received no cable message on that day addressed "Baker Seattle."

Q. 5. If you answer the fourth interrogatory in the affirmative you may state what cable said message came over to New York and to whom the same was addressed when it arrived at New York.

A. Cable or Western Union Telegraph Company lessees of the American Telegraph and Cable Company, addressed "Barker," "Seattle."

Q. 6. If you have the original message referred to in the fifth interrogatory you will here produce it, identify it, and deliver it to the office taking your deposition, and cause it to be annexed to your deposition and marked Exhibit "C."

A. Original message as received at New York is here to attached and marked "Exhibit C."

Q. 7. Was any message received by the defendant on October 1st, 1891, at New York, from Sydney, Australia, addressed to "Baker" Seattle, Washington, and reading, "Offered four pounds thousand cif advise accept market dull no outlet." A. No.

Q. 8. State whether on the 1st day of October, 1891, the message referred to in the fifth interrogatory was transmitted by the defendant from New York to Seattle, Washington, and if so on what day was the same so transmitted?

A. The said message was transmitted on the first day of October, 1891, addressed "Barker, Seattle."

Q. 9. Was the defendant at any time to your knowledge informed that the message Exhibit "C" was for "Baker" and not for "Barker," Seattle? If so, when, where, and by whom was such information given?

A. Defendant was informed on the 9th of October, 1891, by the Eastern Telegraph Company at Penzance, England, that the message was for Baker, Seattle.

Q. 10. Was any other message received by the defendant in New York from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked Exhibit "C," addressed either to "Barker" or "Baker"?

A. No.

Q. 11. You may state, if you know, if messages by cable from Australia on or about October 1st, 1891, were received by the defendant at any other office in New York than its cable office in which you were then employed?

A. No. Such messages are received only at the cable office.

Q. 12. If you know any other facts in reference to the controversy between the parties to this section, state them fully.

A. No other facts.

Q. 13. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or that may be material to the subject of this your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

A. No.

[Caption.]

Cross-Interrogatories and Answers.

Q. 1. You are the manager of the Western Union Telegraph Company, are you not? If you are not, what position do you hold? Are you not manager of the cable department of the Western Union Telegraph Company, and in charge of the same? If not, what position do you hold, and what position were you so holding on October the first, 1891?

A. My title and position is chief clerk Cable Message Bureau, and I am in charge of such bureau or department and have held this position continuously from 1884 to the present time.

Q. 2. Do you say that you saw a message addressed to Seattle, Washington, to "Baker"? If so, where did you see this message? If you say it was not so addressed, how was it addressed? If you say you saw it on the day of its delivery to your company, state what it was that attracted your attention to the message by which you can say that the letter "R" was not in the message—that is, in the name.

A. I saw no message addressed "Baker, Seattle." I saw a message addressed to "Barker, Seattle." Do not remember that I saw it on the day of its delivery. My attention would be attracted by the service messages attached correcting the address.

Q. 3. Where is the original message addressed to Baker if you produced it? Is the message produced to the original interrogatory the message? Is it not true that this is not the message but one that you have had prepared for the purpose of attaching to this case? And if so, who prepared it? And under whose directions and when?

A. Original message as received by this company at New York addressed "Barker" is attached to this deposition and marked "Exhibit C." It is the message produced to the original interrogatory. It is not true, and message attached is the original message received at New York, and was not prepared for the purpose of attaching to this case.

Q. 4. If you say the message received by your company from Sydney, Australia, was as follows: "Baker, Seattle, Washington offered four pounds thousand cif advise accept market dull no outlet," when did such message arrive, and when was it transmitted?

A. No such message was received by defendant company, and could not have been transmitted. The message received was addressed "Barker, Seattle."

Q. 5. Who does the transmission in your office of cablegrams; yourself? Who did the immediate transmission upon October 1st, 1891? If you give the person's name, where is such person? If you say you did not

yourself make the transmission, how do you know what was transmitted to the office at Seattle? If you say you do personally know what was transmitted at that time, state why it was that you gave your particular attention to this message so as to note when it was transmitted. Were you expecting a suit by reason of the mistake? Is it not true that you do not know who transmitted the message of your personal knowledge, from either having seen them or having transmitted the message yourself? Are you not testifying, and did you not testify in answer to your direct interrogatories—being the 7th and 8th—simply from what you have your record say concerning the same?

A. Telegraph operators and not myself. Operator Delano received at and operator Locke transmitted the Barker message from New York, and both are still in the service of the Western Union Telegraph Company at New York City. I know what was transmitted to Seattle because that office reported the receipt of the Barker message. I gave no particular attention to the message and was not expecting any suit. I did not transmit the message from New York, but do know who transmitted it. In answer to the 7th and 8th interrogatories, I testify from what my records show, from a personal examination of the Barker message, and from messages sent from the Seattle office, reporting that they were unable to deliver the message because it had been returned by "Barker 1st National Bank" as not being for him.

Q. 6. Do you know Mr. H. W. Baker of Seattle, the plaintiff in the above-named case? If you say you do not know him, do you remember a person, saying his

name was H. W. Baker of medium size, light complexion, hailing from the city of Seattle, who applied to you on the forenoon of Monday, June 13th, 1892, who asked you for the privilege of inspection of the original message addressed to him from Sydney, Australia? Did you permit him that privilege? Is it not a fact that you refused it? Did you not give your reason for refusal that it was against the rules? And did you not do this after you had found the message and inspected it yourself and then declined?

A. Do not know H. W. Baker and do not remember his calling on me June 13th, 1892, but if he did call and asked the privilege of inspecting the original message, I have no doubt the privilege requested was refused, as it is against the rules of the company and I may have said so, but would have declined anyway. Of course, I had previously inspected the message on receipt of the service message from Seattle, reporting unable to deliver, referred to in my answer to the fifth cross-interrogatory.

Q. 7. Are you acquainted with the gentleman who is taking your testimony? Have you had any conversation with your counsel or the counsel of your company or any other person as to what you should say? Have you had this testimony submitted to any gentleman interested in your company or counsel of your company, or who is hearing your testimony for their ratification or indorsement of the same or the correction of the same? If so, who is the gentleman—when and where? A. No.

Q. Who did you consult previous to going before the officer, to take your testimony, and what was your con-

sultation if it was about this case? If it referred to your testimony, what was it you were told not to testify or to testify, and have you so followed such direction? Have you received directions from any person as to what your testimony should be? If so, what person, when and where and what were the directions?

A. Have received no directions from any person and have consulted no one about the case or as to what my testimony should be.

Q. 9. Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule of your company and of your office to destroy those original messages every six months from the date they were received? Is it not true that pursuant to this rule this message, with all other messages, was destroyed? If not—if you say it is not so, why was it that you kept this one message? Is it not true that the message attached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

A. The message attached is the original received at New York and was never destroyed. Files of cable messages are destroyed twelve months after date. This message was not destroyed at that time as it was taken from the files for the purpose of this inquiry about May 24th, 1892. The message attached is the original received at New York and has not been prepared for this case.

(Signed) MICHAEL J. O'LEARY.

(Duly attested.)

E. H. BROWN, called as a witness in behalf of defendant, being first duly sworn, testifies as follows:

Q. (By Mr. BURLEIGH)—State your name and residence?

A. E. H. Brown, residence Seattle.

Q. How long have you lived here?

A. Since August, 1891.

Q. What business are you engaged in, Mr. Brown?

A. Manager of the Western Union Telegraph Company's office.

Q. How long have you been manager of the Western Union Telegraph Company at Seattle?

A. Since August 1st, 1891.

Q. Were you such manager on the 1st day of October, 1891?

A. Yes, sir.

Q. Do you know the plaintiff in this case, H. W. Baker?

A. Yes, sir.

Q. How long have you known him?

A. Ever since I have been here.

Q. About when did you get acquainted with him, Mr. Brown?

A. I don't think I met him to get acquainted with him until some time in the spring of 1892.

Q. I will ask you to examine "Plaintiff's Exhibit A" and state to the jury what you know about the transac-

tion of the receipt and delivery of that telegram at the Western Union Telegraph Company's office in this city?

A. This telegram dated October 1st—Sydney October 1st and received here at eight o'clock and seven minutes on that morning from the Portland office. It is addressed "Barker, Seattle. Offered four pounds thousand if advise accept market dull no outlet."

Q. When was that message received?

A. Eight o'clock, seven minutes on the morning of October 1st, 1891.

Q. By whom was it received?

A. The operator's letters are there, but I don't remember just now who that operator was. I think his name was Adams.

Q. What course would that cablegram take in your office on its receipt according to the usual course of business?

A. It is taken from the instrument table to the press table and a letter-press copy taken by the lady in charge; he then envelopes this and addresses it "Barker, Seattle," and then it is handed to the delivery clerk, sealed in an envelope and by the delivery clerk sent out by a messenger boy for delivery.

Q. Do you know what was done with that particular message on its receipt on the first of October, 1891, either personally or from the records of your office?

A. From the records I see that it was delivered at the Merchants' National Bank and receipted for by A. McIntosh, who was the president of the bank, and the time of that delivery was within a few minutes after the receipt of this message.

Q. What next occurred, calling your attention to that message?

A. I think it was some time in November, along in the middle or the latter part of November I was in the northern part of the city and, among other places, I called at Mr. Baker's office. He was not there, but I saw the bookkeeper, and I was asking how our business suited them—how our delivery and pick-ups and one thing and another suited them, and then he made mention of the fact to me that they had some trouble about a cablegram. I made a memorandum of the date of the message, where from, etc., and when I went back to the office I made inquiry about the matter.

Q. (By Mr. CARR)—What was the date, did you say, when this conversation occurred?

A. At Mr. Baker's office?

Q. Yes?

A. I don't know the exact date, but I should judge from some records I have got it must have been about the 20th of November.

Q. (By Mr. BURLEIGH)—Did you go to Mr. Baker on the 9th day of October about that message?

A. I don't know about this matter on the 9th of October.

Q. Did you at any time call on Mr. Baker and offer to settle the matter by paying him back the outlays and the costs of cabling that he had been to?

A. I have no recollection of it. I would have no authority whatever to make such a proposition.

Q. Did you ever have any authority to make any such proposition or to discuss that matter with him?

A. No, sir.

Q. Did you ever discuss it with him?

A. Not to my recollection, I don't think I did, sir.

Q. When was there any claim made on the company through you for damages for failure to deliver that telegram, if any was made?

Q. The first claim made was by an attorney that said he represented Mr. Baker.

Q. When was that?

A. I think that must have been February, 1892. I can't fix the date.

Q. I will ask you to look at this paper and state what that is, if you can, Mr. Brown?

A. That is what we call a "service message." It is a message sent by a clerk in my office and addressed to the Central Cable office, New York. We address all communications to that office in reference to cables. It reads: "C. C. Of's, N. Y. Sydneys 13 words Oc'r. first 'Barker' of Merchants' National Bank is only one known. He returns it to-day says not for him. Dick Seattle Wn. 8."

Q. Explain what you mean by service message?

A. It is a free message that we sent in the correction of service, or something like that.

Q. It relates to your own business?

A. It relates to business of our office—of the company.

Service message just identified by the witness and read, is here offered and received in evidence on the part of the defendant and marked "Defendant's Exhibit No. 3."

Q. I will ask you to state whether any reply came to that service message, if you can determine from the records of your office?

A. This is the reply to the one I just read (producing document): "Received at Seattle, Wash., 8:09 A. M., Oct. 9, 1891. To Seattle. From Cable Co. Sydney's 13 words 1st is to Baker repeat Baker not Barker. Can you now deliver reply. C. C. Office, N. Y." That last part is signed by the Central Cable office, New York.

Q. Could you tell what hour of the day the service message which is marked "Defendant's Exhibit No. 3" left here?

A. Yes, sir. 8:45 in the evening.

Q. What day?

A. The 8th. And this reply came on the morning of the 9th at 8:09.

Reply to service message just identified and read by the witness is now received in evidence and marked as "Defendant's Exhibit No. 4."

Q. What is this on the back of "Defendant's Exhibit No. 4"?

A. That is the reply to it—the answer is on the reverse side.

Q. Just read the answer?

A. This message we received from the cable office says there (referring to Defendant's Exhibit No. 4): "Can you now deliver?" We say: "C. C. Office, New York. Sydneys 13 words delvd this A. M. to Baker. S. Y. S. Seattle, Wn. 9." That is signed by the Seattle office on the 9th. Signed at 9:10 and the delivery was made.

The above telegram identified and read by the witness is now received in evidence and marked as "Defendant's Exhibit No. 5."

Q. I wish you would state to the jury what the business of the Western Union Telegraph Company was at its Seattle office in September and October, 1891, with respect to the volume of business being done?

A. Well, they were handling at that time between five and six hundred messages a day and perhaps more—I should say about six hundred messages a day at that time.

Q. Now you may state what the rules and practice of the company is as to messages, so far as their contents being divulged to any other people than the party for whom they are intended—what people in the telegraph office know the contents of a message which comes in and how many people see it in the course of business?

Counsel for plaintiff objects as immaterial and irrelevant.

The COURT.—I think what you are trying to prove is a matter of law. It is the business of a telegraph company to preserve the confidence of its patrons. He has testified as to the course of business in the office and the number of people who have to do with the message. Objection sustained.

Q. What is the practice of the telegraph company, Mr. Brown, as to cable addresses and what, if any, means is adopted for the shortening of addresses on cablegrams?

A. There is a system of registering an address. You would select some word, for instance a message comes

here addressed to "Jonas"—well, that word may be registered by some firm in town, and any messages received addressed to "Jonas" we would deliver to that firm.

Q. What is the object in having a cable address registered in that way?

A. Economy. It cheapens the price of them.

Q. How does it cheapen it—explain to the jury?

A. In calculating the tariff on cable messages everything is counted except the date, name to, and the street address and the city and town and each word in the body of the message and the words in the signature are counted.

Q. I want you to testify now whether there is any difference in the practice between cable messages and messages delivered in the United States in that regard?

A. Yes, sir. In that regard there is. Because in messages delivered in the United States the address and signature goes free and there is no charge for them.

Q. How is it as to cable messages?

A. In cable messages everything counts except the date—the place from and the date goes free.

Q. I offer you now the plaintiff's "Exhibit A," which is the original message in this case (showing) and I will ask you to state what there is connected with that message by which it could be delivered or its proper delivery ascertained other than the address?

A. I don't see anything about it that would indicate the particular line of business that it referred to.

Q. Did you know this man Barker to whom that message was delivered?

A. Yes, sir.

Q. Who was he and what was his business here?

A. He was vice-president of the Merchants' National Bank.

Q. You may state whether that was a prominent institution in Seattle at that time?

A. Yes, sir, it was.

Q. Was Mr. Abraham Barker a man of prominence here?

A. Yes, sir.

Q. Was there any other Barker here at that time who would have been likely, in your opinion, to have been connected with transactions on the other side of the world?

A. No, sir. There was none other here to my recollection.

Q. Are you able to tell the jury, Mr. Brown, how a message comes from Sydney to Seattle by wire?

A. Yes, sir. The first sending is to Melbourne, that is on the southern coast, and then from Melbourne around on the western coast to Perth, and then to the upper or northern part of Australia to Perth Amboy and from Perth Amboy it is passed across the sea to the Malay Islands, I think, and then across the Indian Ocean and the Red Sea and the Mediterranean Sea on to Gibraltar, and then from Gibraltar to the northern part of Spain, I think, and from the northern part of Spain across to Porthcurno and from Porthcurno to Penzance.

Q. Do you know from your telegraphic geography from Sydney to Porthcurno?

A. It is the Eastern Company, it is called the Eastern Cable Company.

Q. What is it, an European telegraph company?

A. Yes, sir, cable company.

Q. Is that a connecting line with the Western Union Telegraph Company?

A. Yes, sir. We connect with them.

Q. Do you know what company operates those lines how many stations they relay messages at between Sydney and Penzance?

A. I think it is fifteen—fifteen or sixteen, I could not say exactly.

Q. What is a relay station, Mr. Brown?

A. It is where the message is taken off one wire and passed on another line.

Q. What is the object of relaying messages?

A. Well, it gets to the end of the line and it is transferred over to another line and that is what is called a relay point. Here on our land lines we relay about every six hundred miles

Q. Why?

A. Because we can work much faster and quicker.

Q. You get a stronger and better current?

A. A better current.

Q. Is that the same reason they relay on the line between Sydney and Penzance?

A. No, sir. I think their cables cross the sea.

Q. They relay at the landing places?

A. At the landing places evidently.

Q. I will ask you to examine this book and state if you know what it is?

A. This is a book of rules and regulations and tariff

in use or adopted by the International Telegraph Convention.

Q. Is that a book that is familiar to all the telegraph people in the world?

A. Yes, sir. It is recognized as such.

Q. What does it contain?

A. It contains rules and regulations on which messages are received.

Q. Does it prescribe rules and tariff?

A. Yes, sir.

Q. Just turn to that book and state to the court and jury who the parties are to that convention?

A. Do you mean the parties or the countries?

Q. Yes, just read them over?

A. In this convention Great Britain was represented by J. C. Lamb, H. C. Fischer and P. Benton; for Germany, Hake, Scheffler and Le Sage; for the Argentine Republic, Santiago Alcorta and A. Gonzalez; for South Australia, Francis Dillon Bell; for Austria and Hungary, Obertraut, R. Neubauer, Dr. Benesch and Koller; for Belgium, F. Delarge; for Brazil, Itajuba for Bulgaria, Mattheef, J. P. Ivanoff; for the Cape of Good Hope, J. C. Lamb, H. C. Fischer and P. Benton; for Cochin China, G. Gabrie; for the Spanish Colonies, Primitivo Vigil; for Denmark, Honcke—

Mr. CARR.—We contend that it is not proper or necessary for him to state what this book contains.

Q. (By Mr. BURLEIGH)—Just state whether New South Wales was a party to that convention?

A. Yes, sir. New South Wales represented by Francis D. Bell.

Defendant offers in evidence the book identified by the witness, particularly paragraph 13, pages 17 and 18, in reference to telegraphic messages and addresses, being the rules and regulations controlling the telegraphic service all over the world outside of the United States, on the theory that a message sent at Sydney, New South Wales, over the government lines was subject to the rules and regulations and that Mr. Baker has not any rights superior to the man who sent the message at that point.

Plaintiff objects as irrelevant, immaterial, and incompetent.

Objection sustained. Exception noted for defendant.

Cross-Examination.

Q. (By Mr. CARR)—Mr. Brown, as superintendent and manager of the Seattle office of the Western Union Telegraph Co. in October and November, 1891, what was the general nature of your duties?

A. Manager of the office.

Q. What duties were you charged with?

A. Well, I had the supervision over all the help and the direction as to what each one should do and general supervision over the clerical force of the office and operators.

Q. When you say general supervision you mean you were charged with the duty of keeping the men up to their work, to keep the office going straight?

A. Certainly.

Q. If there are any mistakes or delinquencies, it is your duty to look after them?

A. Yes, sir.

Q. Is it not a constant rule of the office that a mistake of any importance must be reported to you as soon as it is discovered?

A. Yes, sir.

Q. That rule was in force in October, 1891?

A. It was always in force.

Q. It is true, then, is it not, that if any person connected with your office discovered that any mistake of any importance has been made, or it has been claimed to have been made it should be reported at once to you?

A. Yes, sir. That is his duty.

Q. It is a fact, is it not, that the mistake by which this or as the result of which, this telegram remained undelivered for nine days was a serious mistake, no matter by whom it was made?

A. Certainly.

Q. That is, it was, as matters since transpired, of a great deal of importance?

A. Yes, sir, subsequent events.

Q. And if you had known on the 9th of October that such a mistake had been made, that this message remained undelivered for nine days, you would have considered it of such importance as to at once institute very vigorous enquiries?

A. Certainly.

Q. Who was the person at the delivery desk in October, 1891?

A. It was a lady. Her name was Mrs. Overbeck.

Q. Did she have a signature of her own to service messages?

A. Yes, sir. "Dick."

Q. She signed as Dick on the service messages?

A. She was generally known in the office as "Dick."

Q. Among the general and regular customers at the desk she was known as "Dick"?

A. Yes, sir.

Q. That was the lady who wrote the service message?

A. Yes, sir.

Q. Ordinarily speaking she would have reported such a discovery to you at once?

A. Yes, sir. It should have been done.

Q. If she failed to do so she was guilty of a violation of the rules of the office?

A. Yes, sir.

Q. How long did she continue in the service of the company?

A. I think she left there some time in February or April, the next spring.

Q. In the mean time, as I understand your testimony, you had learned that she had committed this flagrant breach of rules by not reporting this trouble to you?

A. Yes, sir.

Q. And you had learned that all this communication between your office and New South Wales went on without your knowledge?

A. I knew that service message—I found out that the

service message had been sent and all the correspondence up to that time.

Q. What action, if any, did you take regarding such a breach of the rules?

A. I censured her very strongly and I removed her as soon as I could find some one else that suited me.

Q. You did not suspect at this time that the same person who would be guilty of such a violation of the rules of your office might be guilty of other breaches of the rules, or did you suspect anything of that kind?

A. No, sir. Nothing came up to attract my attention to it.

Q. Nothing came up to indicate to you that any of the other transactions in regard to this matter had been conducted in violation of the rules by this lady?

A. No, sir. Nothing attracted my attention.

Q. Did you report back to New York that the matter had not been called to your attention?

A. I wrote a letter reporting the whole facts of the case.

Q. Have you a copy of that letter?

A. I think it is in my letter book.

Q. You do not remember this conversation with Mr. Baker which took place, according to his statement on the very day the cablegram was delivered to him?

A. I didn't talk to him.

Q. You are still positive you knew nothing about the matter until along in November?

A. Until along in the middle of November—perhaps along about the 20th of November.

Q. Did you after that time have any difficulty in delivering messages regarding this lumber to Mr. Baker?

A. Not that I am aware of.

Q. You say that you were not personally acquainted with Mr. Baker up to this time in October?

A. No, sir.

Q. Did the accounts of your office pass through your hands at that time?

A. Yes, sir.

Q. Is it not true that for a long time prior to October 1st, 1891, Mr. Baker's monthly bills at your office for telegrams would average over sixty dollars?

A. I think they would. I think they were perhaps larger than that.

Q. From sixty to a hundred dollars a month?

A. He had quite a large bill every month.

Q. You did know H. W. Baker & Co. as patrons of your office to a large extent?

A. Yes.

Q. And you knew what business they were engaged in?

A. Yes. In a general way.

Q. You knew they were general commission and shipping merchants?

A. Yes, sir.

Q. Did you know Mr. Abraham Barker?

A. Yes, sir. In a general way.

Q. You knew he was vice-president of the Merchants' National Bank?

A. Yes, sir.

Q. You knew he was engaged in the conduct of a financial institution?

A. Yes, sir.

Q. In the banking business?

A. Yes, sir.

Q. Do you know and did you know then what the usual unit of measurement or quantity was in speaking of lumber shipments?

A. No, sir. I was not familiar with the lumber business and I am not familiar with it now.

Q. Didn't you know then that lumber was generally spoken of by the thousand in mills and lumber yards?

A. In a general way, yes, sir.

Q. You knew that the term "so many thousand" was applied to lumber?

A. The price of lumber was by the thousand feet.

Q. Do you know of any other commodity in this market which was spoken of in the same way, in which you would use the term so many thousand feet?

A. I don't know that I recollect of anything special.

Q. Especially for foreign shipments?

A. No, sir.

Q. It is a fact, is it not, that during all this time large foreign shipments were being made of lumber from Seattle, Blakely, and other places on the sound?

A. I knew in a general way that there were some shipments being made. I didn't know how large or frequent.

Q. There was more or less cable business going through your office regarding lumber shipments all the time?

A. There may have been. I don't know the contents of those messages.

Q. Do you know what article dealt in by banks that a price would be apt to be cabled on an offer of so much a thousand from Australia?

A. No, sir, I don't.

Q. You say there is nothing in this Barker message of October 1st to indicate that it was not for Mr. Barker and that it was for Baker. There is the statement there offering four pounds thousand cif—that "cif" is a well-known commercial term?

A. Yes, sir. I see it quite often.

Q. That term of itself would indicate the character of the shipment of merchandise of some kind?

A. Possibly.

Q. And you think four pounds a thousand would not indicate anything of the nature of the commodity or the character?

A. It might indicate one thing and it might indicate another.

Q. It does not indicate anything which would lead anyone to believe that the message was intended for a banking institution?

A. I could not state that.

Q. After that did you ever have any trouble in delivering cable messages regarding this shipment of lumber to Baker?

A. There was one message came afterwards that I recollect.

Q. Was there any difficulty experienced in delivering it to Baker?

A. No, sir.

Q. What was it that indicated for whom it was intended?

A. It came from Sydney and it came to Barker and the delivery clerk says "That must be for Baker," and I said "Yes, certainly that must be a continuation of the same business."

Q. That is the cablegram, is it not?

A. November 24th. Yes, sir, that is the message.

Plaintiff introduces in evidence telegram identified by the witness, which is received without objection and marked "Plaintiff's Exhibit E," and reads as follows:

Plaintiff's Exhibit "E."

"Sydney, Nov. 24, 1891. Received at Seattle, Wash.,
8:06 a.

"To Barker, Seattle. No market declining. If not get handling bank would sacrifice. Reply immediate."

Q. There is no signature to that?

A. No, sir.

Q. It is addressed "Barker"?

A. Yes, sir.

Q. It does not say anything about so much a thousand?

A. No, sir.

Q. It does speak about a bank handling something?

A. It reads: "No. Market declining. If not get handling bank would sacrifice. Reply immediate."

Q. Still you did not even go to Barker with it?

A. No, sir. After we found out about the other message it is plain enough who it was for.

Q. But up to this time you didn't know anything about the previous matters—you said it was about the 20th when you heard of it first?

A. Yes, sir. A little before that. This was after I had heard about it. She called my attention to that message. She said, "There is another," and she wanted to know if I didn't think that should be for Baker, and I said, "Yes, it is from the same place and it is probably a continuation of the same subject."

Q. Did you ever make any effort to find out where the mistake was made in the message?

A. I wrote up to our company. I told them we had got another message for Barker.

Q. I wish you would explain to the jury what is the method of receiving those messages in the office. You have already told what was done with them from the time they passed through the operators' table, now what takes place before there is anything to leave the operator's table?

A. Generally we start in in the morning from Portland—they are general messages in the morning—and he keeps on sending messages to us.

Q. How does he send the messages?

A. Over the wire—telegraph.

Q. What is the method—some of these gentlemen may not have been in the telegraph business?

A. The operator at Portland sits down and ticks it off on his key and the sound comes here on the sounder at this end and the operator copies it from the sound.

Q. There is a system of dots and dashes?

A. Dots and dashes.

Q. Which the operator makes by pressing his key, a long or a short pressure making a dash or a dot and that all goes into the ear of the operator?

A. Yes, sir.

Q. And he writes it down with his pencil or pen?

A. Yes, sir.

Q. But in these days is it not true that a great deal of the work of receiving, that is of transcribing from the sounder, is done on the typewriter?

A. They use the typewriter now instead of the pen.

Q. The operator has a typewriter at his table and he listens to the sound of the instrument and writes it on the machine?

A. Yes, sir.

Q. That machine makes a clicking noise?

A. It makes a little noise.

Q. In 1891 that method prevailed largely, didn't it?

A. No, sir. I think we used a pen then.

Q. Didn't it prevail in the east to a considerable extent in 1891?

A. No, sir. We started the typewriter here before they did in the east. They only recently started it in the eastern office.

Q. When did they start to use the typewriter in the eastern offices?

A. In Chicago about a year ago on the Western Union line.

Q. When did you start here?

A. About three or four years ago. I don't recollect the exact date.

Q. You are yourself an operator, are you not?

A. Yes, sir.

Q. But you had nothing to do with the actual telegraphic work of receiving or sending any of these messages?

A. No, sir. I had operators who did that work.

Q. You didn't even hear them as they came in?

A. No, sir.

Q. And that word Baker comes over the wires "b,a,k,e,r"?

A. Yes, sir.

Q. First a dash and three dots for the "B"?

A. Yes, sir.

Q. And then a dot and dash for the "a"?

A. Yes, sir.

Q. And a dash and dot and dash for the "k"?

A. Yes.

Q. And one dot for the "e"?

A. Yes.

Q. And a dot and space and two dots for the "r"?

A. Yes.

Q. And then to get that "Barker" on the line it is necessary to put in between the dot and dash for the "a," a dot and space and two dots for the "r"?

A. Yes, sir.

Q. And that is a very marked insertion, is it not?

A. Yes, sir. That would be quite an insertion.

Q. It would even be worse than putting in a "d," or any other letter with only three characters used and a space between them, but here there is a perceptible pause between the first dot and the second for the "r"?

A. Yes, sir.

Q. If that message started from Sydney, New South Wales, without that dot and space and two dots in between those letters, at some point on these lines some man either in sending put in those extra characters, or the man receiving put them in there without hearing them, is not that true, or else the "Baker" was written in such a way that the "r" would be supposed to exist, that is, he heard the "r," but either wrote it so carelessly that, while it was intended for "Barker," yet it could be read "Baker," that is, that there was some little twist in his writing?

A. Yes, or the operator sending it might have read his copy wrong—he might have read it "Barker" and sent it that way.

Q. Conceding, now, that the message that is here is the original message, or a true copy of it, it reads "Baker," does it not, the one attached to the depositions?

A. The one filed in Sydney?

Q. As I understand, it reads "Baker"?

A. Yes.

Q. Conceding that it started in that way in the office as "Baker," if the mistake was made between the ope-

rator who ticked it off on his instrument and the operator who listened to it at the other end, if it was made between those two, then at the other place would be found the mistake "Barker"?

A. Yes, sir.

Q. And upon whatever division of this long system between here and Sydney that mistake was made, at one end of that division would be found a message reading "Baker" and at the other end the message reading "Barker"?

A. Yes, sir.

Q. That is absolutely beyond question?

A. That is beyond question.

Testimony of witness closed.

Here the testimony is closed; whereupon the Court takes a recess until Monday morning, June 7th, 1897, at 10 o'clock.

June 7th, 1897, 10 o'clock A. M.

After the argument to the jury by counsel for the respective parties, the Court instructed the jury as follows:

Instructions by the Court

Gentlemen of the jury, the plaintiff in this case seeks to recover damages for an injury alleged to have been suffered by him in consequence of a wrong committed by the defendant. The action belongs to the class of actions that are known by lawyers as actions *ex delicto*, or

actions arising from torts, that is, from wrongs committed.

To entitle the plaintiff to recover, it is necessary that it shall be made to appear to you from the evidence in this case that the defendant has committed a wrong in violation of the plaintiff's rights and that that wrong has resulted in an injury and pecuniary damage to the plaintiff:

The two things must be connected together—the wrong and the resulting injury, so that it appears from the evidence that the injury resulted from the wrong in order to entitle the plaintiff to recover damages. If it so appears it is for the jury to assess the amount of damages and fix the sum of money which will be compensation for the injury resulting from the defendant's wrong.

A telegraph company engaged in the business of transmitting intelligence for pecuniary compensation is charged with the duty of exercising a high degree of care as to promptness, accuracy, and good faith in transmitting the message from the sender to the one to whom it is addressed; and any neglect to exercise the requisite degree of care in any of these particulars which results in any injury, gives a right of action and entitles the injured person to have the loss that has been sustained made good or the injury compensated.

The principles which must govern you in determining this case are such as I have already indicated. The facts necessary to be established to entitle the plaintiff to recover, are in the first place, that the defendant company has committed a wrong. The defendant in this case is

not responsible or liable for any wrong or injury committed by another company with which it is not associated in business and where it was not a participant in the wrong. And it is one of the questions of fact to be determined in this case whether the injury which Mr. Baker has sustained results from a blunder, mistake, or wrong committed by the defendant company or the other company which received the message at Sydney to be transmitted to Baker at Seattle. This should be qualified, however, by the statement that if it is shown by the evidence that the telegraphic message dated October 1st, 1891, which is before you, was filed in the cable company's office at Sydney for transmission, addressed to the plaintiff as "Baker," and that the said message was received by the defendant at its Seattle office addressed to "Barker," and that such change in the address resulted in injury or damage to the plaintiff, then it is not necessary that the plaintiff should show at what point between Sydney and Seattle the error was made which resulted in such change in address. I mean by this that if the two things are shown, First, that the message was properly written and delivered for transmission at Sydney and was misdirected when received at Seattle that in this action against the defendant company it is not necessary for the plaintiff to find the place on the line where the error occurred in order to have a right of action against the defendant company, but the burden of proof shifts upon the defendant company to overcome any presumption that the error was committed by its agents along its own line by proof that they re-

ceived the message in Seattle addressed the same as they received it at the other terminus of their line.

The burden of proof is upon the plaintiff to establish the facts necessary to entitle him to recover; and if he has failed to prove any necessary fact, or if he has failed to bring to the support of his contention a fair preponderance of the evidence as to any fact about which there is a dispute, your verdict should be for the defendant.

In this connection I will say that the material facts are to prove that the message was delivered for transmission at Sydney as the complaint alleges it was, and that through an error in the address or delay in the delivery it was not delivered to Mr. Baker promptly as it should have been, and in consequence of the delay he has been injured.

These are the material facts which the plaintiff must prove, and he is bound to establish all of these facts by at least a fair preponderance of the evidence.

The Court instructs you, however, that it is not incumbent upon the plaintiff to prove the exact point at which the error was made, or the manner in which the error was made by reason of the fact that the means of establishing the point at which and the manner in which such errors are committed, whether upon its own lines or connecting lines are peculiarly within the knowledge and control of the company, in a case where the error and damage have been established the burden of showing that the error was not made by the company or its agents or employees is cast upon the defendant.

When in an action of this kind it is shown by competent evidence that a telegram has been delivered to a

telegraph or cable company for transmission and that an error has been committed in its transmission resulting in damage and suit is brought against the company which last received and delivered the message, the law presumes that the responsibility for such error rests with that company, unless it can show that all of its operators and agents and employees who were concerned in transmitting the message were free from negligence.

The Court directs your attention to the testimony given by the depositions of Michael J. O'Leary, and G. R. Mockridge and Edward Chambers, and instructs you that neither one of the said witnesses are shown to be competent to testify as to the manner in which the telegraphic message in question was transmitted over the wire between any points or received at any point on its route. These witnesses do testify to facts which are proper to be considered in this case bearing on the question as to whether the message was properly received, or properly delivered, I should say, to this company.

They show what was on file at the different offices, at Penzance and New York, but the point of this instruction is that they are not good witnesses to prove the condition in which the message came to the office at Penzance; they are giving, not the best evidence, but secondary evidence. They can only testify as to what some other person has placed in the records in their office, or has said about the matter; and the law requires that the witnesses who made those reports to these witnesses should give his testimony under oath the same as other witnesses in order to make it of the same character and

degree of credibility and reliability as the other testimony in the case. Because they are repeating to us here unsworn testimony is why I instruct you their testimony is not good to prove the fact in the case as to the condition of the message when transmitted from Porthcurno to Penzance.

So far as the contents and address of the said message are concerned, the legal effect of the testimony of the two witnesses residing in Penzance is only that the message as recorded in the Penzance office was as shown by the copy attached to said deposition, and the same is true as to the witness O'Leary, the legal effect of his testimony upon that subject being only that the message on file in the office in New York was as shown by the copy annexed to his deposition.

If you find that there is a fair preponderance of the evidence proving or tending to prove that there was a mistake in the address of the message and that the message as received by the defendant at Seattle was addressed in a different way than when it was sent from Sydney, and that by reason of this error there was a misdelivery of the message and delay in delivering it to the plaintiff, and that by reason of that delay the plaintiff lost an opportunity to sell the cargo of lumber referred to in said message to a customer who was ready to buy it and day for it, and that by losing that opportunity of sale he made a loss on the cargo by reason of the decline in the market, and that the defendant has not shown by competent evidence that the error was not committed by the defendant or any of its servants or employees, then your

verdict should be for the plaintiff for the amount of his loss if you find all of these facts from the evidence.

You have a right in determining these facts to take the positive testimony of the witnesses and ascertain what the circumstances are, and to draw any inference that is necessarily deducible from the facts that are shown and proved on the trial. You have no right to bring into the case facts that are not based upon the evidence or facts that may be mere matter of surmise, but any inference that may be reasonably and justly drawn from the testimony as to the conduct of the parties and the conduct of any agent or employee of the defendant, and from these facts and circumstances and the reasonable and necessary inferences to be drawn therefrom, determine the question of liability.

Gentlemen of the jury, you are to decide on the question of negligence in the case; you must find from the testimony what the facts are and say whether these facts constitute negligence which makes the defendant liable. In determining whether the defendant company has been negligent it is your duty to give consideration to all the facts that are proven, both as to the conduct of the defendant and its employes and representatives and all of the other actors in this transaction; Mr. Baker's failure to register a cable address by which he expected to receive messages before this transaction is one of the circumstances which you are to take into account because if he had done that it might have avoided this error. I do not say that it would and I am not saying that you should find that it did, but it is one of the circumstances

that a fair man would take into account and give consideration to before he would come to an ultimate decision on the point of whether the telegraph company was negligent or not. The condition of the message that was delivered for transmission as to the legibility of the writing would be an important circumstance to consider as bearing on the question of whether there was negligence or not. If it were shown that the error was committed in the office of transmittal and that the writing was plainly and legibly addressed to Baker, it would be strong, controlling evidence of negligence.

On the other hand, if it was so illegible and poorly written and indistinctly written that almost anybody might have made a mistake in it it would go very far towards disproving negligence. The testimony does not show what the condition of the writing was any further than there is testimony of a witness that the message he sent was directed to Baker, and there is a copy of a dispatch introduced in evidence which bears upon it an endorsement that would be legal evidence of an admission against the telegraph company that received it for transmission—an admission that that was received addressed to Baker, and there is an absence of testimony tending to prove that the writing delivered in Sydney was not legibly written.

Now from all that a presumption naturally arises that the message was started right; that Mr. Baker's agent in Sydney or his correspondent there delivered a message addressed to Baker and not one that might have been mistaken as being addressed to Barker, but the evidence

is entirely silent as to whether the error occurred in the office of transmittal—there is nothing to show that it occurred there, so that this question of the legibility of the writing can have but very little effect in aiding you in arriving at a decision. I mention that now because I am going to give you an instruction later on on the question of the legibility of writing.

The defendant company was in duty bound to use a reasonable and in fact a high degree of care and prudence in delivering the message to see that it got into the hands of the person for whom it was intended.

If this message had come to the Seattle office addressed to Abraham Barker and it had been delivered at Mr. Barker's place of business or his residence to a mature and prudent person—an adult, prudent person there according to the usual custom of business, it would be hard to blame the company for negligence in so delivering it, but a message simply directed to Barker, unless there was some previous understanding between Mr. Barker and the telegraph company by this having registered that address in the company's office according to their rules for registering, would not give them the right to send that message and drop it down on his desk or leave it in the hands of some other person without some inquiry as to whether he was the proper Barker that was entitled to receive it.

The manner in which the company's employes here in the Seattle office acted in regard to the delivery of this message, Mr. Baker's conduct, and all the facts that are shown in the case are to be taken into account, and from all this you are to reach a decision as to whether or not

this defendant has caused an injury by being negligent.

Before passing entirely from this it is proper for me to suggest to you that the testimony proves that this telegram was received for by Mr. McIntosh, the president of the bank, and there is no evidence tending to prove that the company or the employes of the company here did know that Mr. Barker was out of town. They naturally would expect that if the telegram was not intended for Mr. Barker that the matter would have been reported and they could have traced the matter up, but no report coming in, they would naturally suppose that the message had been properly delivered. The fact that a man of Mr. McIntosh's position and standing as a business man received for this telegram and failed to make any report for several days until Mr. Barker returned is among the other things which you are entitled to take into account and give what weight and consideration to as seems to you to be right.

The court instructs you that it appears from the evidence that the message in question came into the hands of the Western Union Telegraph Company at Penzance, England, at which place the message was delivered by the Eastern Cable Company to the defendant. If the jury find that the message which was so delivered by the Eastern Cable Company to the defendant was at the time of such delivery addressed to "Barker," not "Baker," then no negligence can be imputed to the defendant for the error in the address when received at Seattle. The testimony, gentlemen—the uncontradicted testimony—proves that Penzance was the other terminus of the de-

defendant company's line and their responsibility for negligence begins at that office and not at Porthcurno. If the error occurred in transmitting the message from Porthcurno to Penzance and was a blunder on the part of the transmitter at Porthcurno, it would not be the negligence of this defendant. If the error was on the part of the operator who received the message in the Penzance office, then it would be negligence for which this defendant company is liable.

A party doing business with a telegraph company, and who is receiving messages under an abbreviated or assumed name owes it to the telegraph company that he advise it that he is so doing and that he expects messages so addressed, in order that no mistake may be made by such telegraph company in the delivery of such message.

The telegraph company is bound to deliver messages as they are addressed, and have no right to disclose the contents of any message to any person other than the one addressed. If the defendant received the message in question addressed to "Barker," then when it had reached its destination it had no right to disclose the contents to any person of the name of "Baker," so long as it was not informed that the message was intended for "Baker" and not for "Barker."

It is the duty of any person sending a telegram to another to make the address so plain as that the telegraph company may in the exercise of ordinary care and diligence, deliver the same without the necessity of making inquiry.

The defendant is not bound to show how or where the

mistake occurred. If it shows that it did not occur on its line or by its employes that is sufficient, and it is not required to go further and show how or where it did occur.

There has been some argument by counsel on different sides here upon this point. Counsel for plaintiff have argued that the defendant has not done as much as it should in disproving negligence unless it furnishes proof to show you that somebody else, and who committed the error.

Counsel for defendant has argued that it is necessary for the plaintiff to prove where the error occurred in order to fasten liability upon the defendant by proving that the error occurred in the work of the defendant company.

Now, they are both out of the way about that to some extent. The burden is not on the plaintiff to prove where the error occurred in order to have a right to recover from the defendant. The defendant is obliged to prove that the error did not occur in any of its offices, but it is not obliged to go further than that and prove where the error was committed. If the defendant has cleared itself that is all that it is called upon to do here.

If two persons should be suspected of having committed an injury it would not be necessary for one of them, in order to get clear, to prove not only that he did not do it, but also to prove that the other did. If the second party was the wrongdoer and had succeeded in concealing the evidence of his guilt it would afford no reason for fastening the guilt upon the other one. If the other one had gone as far as the law required to show innocence he

might rest there without fastening guilt upon anyone else. Now that is the case between the two connecting telegraph lines. The Western Union Telegraph Company is sued and if the Western Union Telegraph Company has proved that it is free from negligence it can stop there and it does not have to prove that the connecting line was negligent.

Now as to the measure of damages: If the plaintiff is entitled to recover at all he will be entitled to the difference between the price for which he could have sold the lumber if he had received the telegram promptly and acted upon it, and the market value of the lumber at Sydney between the date of the telegram and the time when it was delivered to him.

If you find for the plaintiff, you will take the offered price and the market price at the date of the receipt of this telegram and allow as damages the difference between the two amounts with interest on the amount of the difference at the rate of seven per cent per annum from the date of the commencement of this action, February 20th, 1893. If you allow any damages at all you will cast up the interest on the amount of your award from the 20 day of February, 1893, until the date of your verdict. I want you to understand by that that a man cannot make a loss and then claim as damages the difference between what he could have got for the property and what he did get for it if he held on to it on a declining market and waited until the bottom notch was reached; but he is entitled simply to be made good for the decline during the time that he was kept out of the oppor-

tunity to deal with his property by reason of the delay in delivering the message.

To assess damages you will determine from the testimony what price Mr. Baker could have received for this cargo of lumber after he learned of the delay in the delivery of this message, and the difference between that price and the price at which he could have sold if he had received the other telegram promptly with interest as I have directed, will be the amount for which his damages should be assessed.

I have prepared two forms of verdict which you can take to your juryroom and use whichever one will conform to your decision. If you find in favor of the plaintiff you will use the one which reads "for the plaintiff" and fill the blanks by inserting the amount in dollars and cents which you award as damages and have it signed by your foreman and bring it in as your verdict; and if you find for the defendant the other form will answer and it is only necessary that it should be signed by your foreman.

Mr. BURLEIGH.—Before the jury retires, there is one point that I want to suggest to your mind. I ask the court to further instruct the jury on the point that is suggested by an instruction requested by the plaintiff, and which I did not notice until the court read it. The court instructed the jury and explained to the jury the competency and legal effect of the evidence of Mockridge and Chambers, superintendent and manager of the Western Union Telegraph Company at Penzance, the effect of which instruction was that they were not compe-

tent to testify to the telegram as it came to the Penzance office, or at least that it was not shown that they were competent. I would like to have your Honor instruct the jury that they were competent to testify to the originality of the paper which attached to their deposition as the copy made at the time of the receipt of the original telegram as it existed in that office and that that telegram made at the time is the best evidence of the contents of the telegram received at that office obtainable; in other words, that this telegram which is attached to this deposition being identified as the original copy in the Penzance office made at the time of the receipt of the telegram is the best evidence of the contents of the telegram as received there.

The COURT.—I think you are going a little too far in what you claim there Mr. Burleigh, about its being the best evidence of the telegram actually received there. According to the testimony, the telegram received at Penzance came by sounds, and the very best evidence of what was received in the office at Penzance would be the testimony of the person who heard the sounds and recorded them. I do not know how far our statutes may have made a telegram after it is transcribed legal evidence, but I do not think it would apply to a case of this kind or dispense with the proof as to what was transmitted by sound to that office.

I want the jury to understand by what I have said that the testimony of the witnesses who have given their depositions here, Mr. Chambers and Mr. Mockridge, is the best evidence obtainable, as to what the files in the office

at Penzance show was received as the message, and it is competent for that purpose, as I have said, that it is competent to be considered as bearing on the question, but it is not the best evidence as to how the message was transmitted from Porthcurno.

Thereupon the plaintiff requested the Court to instruct the jury as follows:

I.

“Gentlemen of the jury: The plaintiff in this case seeks to recover damages for an injury alleged to have been suffered by him in consequence of a wrong committed by the defendant. The action belongs to the class of actions that are known by lawyers as actions *ex delicto*, or actions arising from torts, that is, from wrongs committed. To entitle the plaintiff to recover it is necessary that it shall be made to appear to you from the evidence in this case that the defendant has committed a wrong in violation of the plaintiff’s rights and that that wrong has resulted in an injury and pecuniary damage to the plaintiff.”

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

II.

“The two things must be connected together—the wrong and the resulting injury—so that it appears from the evidence that the injury resulted from the wrong, in order to entitle the plaintiff to recover damages. If it so appears it is for the jury to assess the amount of damages and fix the sum of money which will be compensation for the injury resulting from the defendant’s wrong.”

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

III.

“A telegraph company engaged in the business of transmitting intelligence for pecuniary compensation is charged with the duty of exercising a high degree of care as to promptness accuracy, and good faith in transmitting the message from the sender to the one to whom it is addressed; and any neglect to exercise the requisite degree of care in any of these particulars which results in an injury, gives a right of action and entitles the injured person to have the loss that has been sustained made good or the injury compensated.”

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

IV.

“The principles which must govern you in determining this case are such as I have already indicated. The facts necessary to be established to entitle the plaintiff to recover are, in the first place, that the defendant company has committed a wrong. The defendant in this case is not responsible or liable for any wrong or injury committed by another company with which it is not associated in business and where it was not a participant in the wrong. And it is one of the questions of fact to be determined in this case whether the injury which Mr. Baker has sustained results from a blunder, mistake or wrong committed by the defendant company or the other company which received the message at Sidney to be transmitted to Baker at Seattle. This should be qualified, however, by the statement that if it is shown by the evidence that the telegraphic message dated October 1st, 1891, which is before you, was filed in the Cable Company’s office at Sidney for transmission, addressed to the plaintiff as “Baker,” and that the said message was received by the defendant at its Seattle office addressed to “Barker,” and that such change in the address resulted in injury or damage to the plaintiff, then it is not necessary

that the plaintiff should show at what point between Sidney and Seattle the error was made which resulted in such change in address."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

V.

"The burden of proof is upon the plaintiff to establish the facts necessary to entitle him to recover; and if he has failed to prove any necessary fact, or if he has failed to bring to the support of his contention a fair preponderance of the evidence as to any fact about which there is a dispute, your verdict should be for the defendant."

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

VI.

“The court instructs you, however, that it is not incumbent upon the plaintiff to prove the exact point at which the error was made, or the manner in which the error was made. By reason of the fact that the means of establishing the point at which and the manner in which such errors are committed, whether upon its own lines or connecting lines are peculiarly within the knowledge and control of the company, in a case where the error and damage have been established the burden of showing that the error was not made by the company or its agents or employes is cast upon the defendant. When in an action of this kind it is shown by competent evidence that a telegram has been delivered to a telegraph or cable company for transmission and that an error has been committed in its transmission resulting in damage and suit is brought against the company which last received and delivered the message, the law presumes that the responsibility for such error rests with that company, unless it can show that the error was committed by some connecting line; in other words, when the error is shown to have been committed, the burden of proof is placed upon the company sued to show that it is not responsible for the error.”

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modi-

fied, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

VII.

“The court directs your attention to the testimony given by the depositions of Michael J. O’Leary, and G. R. Mockridge and Edward Chambers, and instructs you that neither one of the said witnesses are shown to be competent to testify as to the manner in which the telegraphic message in question was transmitted over the wire between any points or received at any point on its route.”

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

VIII.

“So far as the contents and address of the said message are concerned, the legal effect of the testimony of the two witnesses residing in Penzance is only that the message

as recorded in the Penzance office was as shown by the copy attached to said depositions, and the same is true as to the witness O'Leary, the legal effect of his testimony upon that subject being only that the message on file in the office at New York was as shown by the copy annexed to his deposition."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

IX.

"If you find that there is a fair preponderance of the evidence proving or tending to prove that there was a mistake in the address of the message and that the message as received by the defendant at Seattle was addressed in a different way than when it was sent from Sidney, and that by reason of this error there was a misdelivery of the message and delay in delivering it to the plaintiff, and that by reason of that delay the plaintiff lost an opportunity to sell the cargo of lumber referred to in said message to a customer who was ready to buy it and pay for it, and that by losing that opportunity of sale he made a loss on the cargo by reason of the decline in the market, and that the defendant has not shown by competent evidence that the error was not committed by the defendant or any of its servants or employes, then your verdict

should be for the plaintiff for the amount of his loss if you find all of these facts from the evidence. You have a right in determining these facts to take the positive testimony of the witnesses and ascertain what the circumstances are and to draw any inference that is necessarily deducible from the facts that are shown and proved on the trial. You have no right to bring into the case facts that are not based upon the evidence or facts that may be mere matter of surmise, but any inference that may be reasonably and justly drawn from the testimony as to the conduct of the parties and the conduct of any agent or employe of the defendant, and from these facts and circumstances and the reasonable and necessary inferences to be drawn therefrom, determine the question of liability."

Which instruction was given by the court, and to the giving of which the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the plaintiff requested the court to instruct the jury as follows:

X.

"Now as to the measure of damages: If the plaintiff is entitled to recover at all, he will be entitled to the difference between the price for which he could have sold the lumber if he had received the telegram promptly and acted upon it, and the market value of the lumber at Sidney between the date of the telegram and the time when it was delivered to him.

“If you find for the plaintiff, you will take the offered price and the market price at the date of the receipt of this telegram and allow as damages the difference between the two, with interest at the rate of seven per cent per annum from the date of the commencement of this action. I want you to understand by that that a man cannot make a loss and then claim as damages the difference between what he could have got for the property and what he did get for it if he held on to it on a declining market and waited until the bottom notch was reached; but he is entitled simply to be made good for the decline during the time that he was kept out of the opportunity to deal with his property by reason of the delay in delivering the message.”

Which instruction was modified and given by the court; and to the giving of which instruction, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted, for that the same does not correctly state the law.

Thereupon the defendant requested the court to instruct the jury as follows:

1.

“That there is nothing on the face of this telegram which would indicate to a person not acquainted with the transaction that it refers to a sale of lumber or that it was intended to be delivered to the plaintiff in this ac-

tion. In cases where a telegram is so written that its contents convey no meaning to the agents of the telegraph companies into whose hands it may come for transmission and delivery, so that its importance may be fully understood, the sender takes the risk of the proper transmission and delivery of the message, and the company would be liable for but nominal damages for any error which might occur after it came into its hands."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

5.

"The court instructs you that from all the evidence introduced in this case it appears that this telegram when delivered to the Western Union Telegraph Company at Penzance, in England, was addressed to "Barker" and not to "Baker." It had no signature. There was nothing about the telegram from which the company could understand that it was intended for "Baker." It was therefore not negligence on the part of the defendant to deliver the telegram to "Barker."

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

6.

“The jury is instructed that from all the evidence in this case the defendant does not appear to have been guilty of negligence either in the receipt, transmission or delivery of the message which it received, and therefore your verdict must be for the defendant.”

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

7.

“The jury is instructed that the measure of damages will be the difference between the price which was actually offered by the telegram of October 1, 1891, and the highest price thereafter offered and which might have been obtained by the plaintiffs for the lumber in question.”

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

8.

“The burden of proof is on the plaintiff to establish all the material facts of his case essential to a recovery. Before he can hold the defendant liable for changing the address of this telegram from “Baker” to “Barker” he must show that it came into the hands of the defendant addressed to “Baker” and was in some way changed to “Barker” by the defendant, its officers or employes.”

Which instruction was refused by the court, and to such refusal of the court to give said instruction the defendant then and there excepted.

Thereupon the defendant requested the court to instruct the jury as follows:

2

“The court instructs you that it appears from the evidence that the message in question came into the hands of the Western Union Telegraph Company at Penzance, England, at which place the message was delivered by the Eastern Cable Company to the defendant. If the jury finds that the message which was so delivered by the Eastern Cable Company to the defendant was at the time of such delivery addressed to “Barker,” not “Baker,”

then no negligence can be imputed to the defendant for delivering it to the only Barker at that time residing in Seattle who would be likely to be likely to be interested in transactions of any magnitude.”

Which instruction was modified by the court and given as modified; and to the refusal of the court to give said instruction as requested, and to the modification thereof and the giving of the same as modified, the defendant then and there excepted.

Thereupon the court instructed the jury as follows:

“Now from all that a presumption naturally arises that the message was started right.”

To the giving of which instruction by the court the defendant then and there excepted for that the same does not correctly state the law.

Thereupon the court instructed the jury as follows:

“The defendant company was in duty bound to use a reasonable and in fact a high degree of care and prudence in delivering the message to see that it got into the hands of the person for whom it was intended.”

To the giving of which instruction by the court the defendant then and there excepted for that the same does not correctly state the law.

Thereupon the court instructed the jury as follows:

“The manner in which the company’s employes here in the Seattle office acted in regard to the delivery of this message, Mr. Baker’s conduct and all the facts that are shown in the case, are to be taken into account and from all this you are to reach a decision as to whether or not this defendant has caused an injury by being negligent.”

To the giving of which instruction by the court the defendant then and there excepted for that the same does not correctly state the law.

Thereupon counsel for defendant requested the court to instruct the jury as follows:

“I would like to have your honor instruct the jury that Mockridge and Chambers, superintendent and manager respectively of the Western Union Telegraph Company at Penzance, were competent to testify to the originality of the paper which is attached to their deposition as the copy made at the time of the receipt of the original telegram as it existed in that office and that that telegram made at the time is the best evidence of the contents of the telegram received at that office obtainable; in other words, that this telegram which is attached to this deposition, being identified as the original copy in the Penzance office, made at the time of the receipt of the telegram, is the best evidence of the contents of the telegram, as received there.”

Which instruction was refused by the court, and to the refusal of the court to give said instruction the defendant, then and there excepted.

All of which exceptions to instructions given by the court and refused by the court were taken in writing after the jury had retired to deliberate upon their verdict and before the rendition of their verdict for the reason that this court refused in all cases to allow exceptions to be taken in the presence of the jury, and would not have allowed exceptions to be so taken in this case had it been asked, but no request was made by either party to take such exceptions before the jury retired.

Now comes the defendant and presents this, its bill of exceptions to the court, pursuant to the rules and requests the court to sign and seal the same as the bill of exceptions in said action, which here and now the court does.

Dated June 28, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions proposed by defendant. Filed June 17, 1897 in the U. S. Circuit Court. A. Reeves Ayres, Clerk, By A. N. Moore, Deputy.

Bill of Exceptions as settled. Filed June 28, 1897 in the U. S. Circuit Court. A. Reeves Ayres, Clerk, By H. M. Walthew, Deputy.

[Title of Court and Cause.]

Judgment.

This cause having come on duly and regularly for trial before the court and a jury, and said cause having been duly and regularly tried before the court and a jury, and the jury having rendered a verdict herein on the 7th day of June, 1897, in favor of the plaintiff and against the defendant, for the sum of \$3215.60, and a motion for a new trial having been made by the defendant and denied by the court, the plaintiff this day moves for judgment upon the verdict, and the court being fully advised in the premises grants said motion;

Wherefore, it is ordered, considered and adjudged that the plaintiff H. W. Baker, do have and recover of and from the defendant, The Western Union Telegraph Company, the sum of three thousand two hundred and fifteen dollars and sixty cents (\$3215.60), with interest thereon at the rate of seven per cent per annum from the 7th day of June, 1897, together with the costs of this action taxed at \$143.21, and that execution issue therefor.

Done in open court this 28th day of June, A. D. 1897.

Defendant excepts to the entry of the foregoing judgment, which exception is allowed by the court.

C. H. HANFORD,
Judge.

Received copy of the within judgment and service of the same admitted this 28th day of June, 1897.

I. D. McCUTCHEON &
BURLEIGH & PILES,

Atty. for Deft.

[Endorsed]: Judgment. Filed this 28th day of June, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Order as to Bill of Exceptions.

Be it remembered that on this 28th day of June, 1897, the above cause came on regularly to be heard on the defendant's motion for a new trial, a copy of which is as follows, to-wit:

In the Circuit Court of the United States, District of Washington, Ninth Circuit, Northern Division.

H. W. BAKER,

Plaintiff,

v.

THE WESTERN UNION TELE-
GRAPH COMPANY,

Defendant.

} No.

Motion for New Trial.

Now comes the defendant by I. D. McCutcheon and Burleigh & Piles its attorneys, and moves the court to set aside the verdict of the jury heretofore rendered in this action, and to grant a new trial of said action upon the following grounds, namely:

I.

Excessive damages appearing to have been given under the influence of passion and prejudice.

II.

Error in the assessment of the amount of recovery.

III.

Insufficiency of the evidence to justify the verdict or other decision, and that it is against law.

IV.

Error in law occurring at the trial of said action and excepted to at the time by the defendant.

I. D. McCUTCHEON,

BURLEIGH & PILES,

Attorneys for defendant.

After full argument of the same by counsel for plaintiff and defendant respectively, and the court being duly advised in the premises, it was ordered that the same be denied, to which ruling and order denying said motion for a new trial the defendant then and there excepted, for that the court erred in not granting said motion of the defendant for a new trial.

And now, at the request of the defendant, in order that the foregoing matters may become a part of the record in said case, I here now sign this bill of exceptions.

Dated June 30, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed June 30, 1897. A. Reeves
Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Petition for Writ of Error.

The Western Union Telegraph Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered therein on the 28th day of June, 1897, pursuant to said verdict, where

by it was considered ordered and adjudged that the plaintiff do have and recover of and from said defendant the sum of three thousand two hundred and fifteen and 60-100 dollars with interest thereon and costs, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition, comes now by I. D. McCutcheon and Burleigh & Piles, its attorneys, and prays said Court for an order allowing said defendant to prosecute the writ of error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, for the correction of errors so complained of, under and according to the laws of the United States, in that behalf made and provided; and also that an order be made, fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that, upon the giving of said security, all further proceedings in this court shall be suspended and stayed, until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit; and that the transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to the United States Circuit Court of Appeals.

And your petitioner will ever pray.

Dated this 8th day of July, 1897.

I. D. McCUTCHEON &
BURLEIGH & PILES,

Attorneys for defendant, the Western Union Telegraph
Company.

Received true copy of the enclosed petition this 8th day of July, 1897.

PRESTON, CARR & GILMAN,
Attorney for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed July 8, 1897. A. Reeves Ayres Clerk, By A. N. Moore, Deputy.

[Title of Court and Cause.

Order Granting Writ of Error, etc.

This cause coming on this day to be heard in the courtroom of said court, in the city of Seattle, Washington, upon the petition of the defendant, the Western Union Telegraph Company, herein filed, praying for the allowance of a writ of error, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with the assignment of errors also herein filed within due time, and praying also that the transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow to said defendant the writ of error prayed for, and

It is ordered that upon the giving by said defendant, the Western Union Telegraph Company, of a bond according to law in the sum of six thousand seven hundred dollars (\$6,700.00), the same shall operate as a superseas bond, and all proceedings be stayed pending the determination of said writ of error.

Dated this 8th day of July, 1897.

C. H. HANFORD,

Judge.

[Endorsed]: Order. Filed July 8, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Assignment of Errors.

And now on this 8th day of July, 1897, comes the Western Union Telegraph Company, the above-named defendant, and plaintiff in error and in connection with its petition this day made to the judges of the United States Circuit Court of Appeals, Ninth Circuit, for the issuance of a writ of error from the said Court to the above named United States Circuit Court for the District of Washington, to review the judgment entered by said last-named court in this cause on June 28, 1897, says that in the records and proceedings in this cause, upon the hearing and

determination thereof in said Circuit Court of the United States for the District of Washington, in the Northern Division of said District, there was and is a manifest error in the following particulars, and in each thereof, to wit:

I.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“Gentlemen of the jury: The plaintiff in this case seeks to recover damages for an injury alleged to have been suffered by him in consequence of a wrong committed by the defendant. The action belongs to the class of actions that are known by lawyers as actions *ex delicto*, or actions arising from torts, that is, from wrongs committed. To entitle the plaintiff to recover it is necessary that it shall be made to appear to you from the evidence in this case that the defendant has committed a wrong in violation of the plaintiff’s rights, and that that wrong has resulted in an injury and pecuniary damage to the plaintiff.”

II.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“The two things must be connected together,—the wrong and the resulting injury,—so that it appears from the evidence that the injury resulted from the wrong, in

order to entitle the plaintiff to recover damages. If it so appears it is for the jury to assess the amount of damages and fix the sum of money which will be compensation for the injury resulting from the defendant's wrong.

III.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“A telegraph company engaged in the business of transmitting intelligence for pecuniary compensation is charged with the duty of exercising a high degree of care as to promptness, accuracy, and good faith in transmitting the message from the sender to the one to whom it is addressed; and any neglect to exercise the requisite degree of care in any of these particulars which results in an injury, gives a right of action and entitles the injured person to have the loss that has been sustained made good or the injury compensated.”

IV.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“The principles which must govern you in determining this case are such as I have already indicated. The facts necessary to be established to entitle the plaintiff to recover are, in the first place, that the defendant company

has committed a wrong. The defendant in this case is not responsible or liable for any wrong or injury committed by another company with which it is not associated in business and where it was not a participant in the wrong. And it is one of the questions of fact to be determined in this case whether the injury which Mr. Baker has sustained results from a blunder, mistake or wrong committed by the defendant company or the other company which received the message at Sydney to be transmitted to Baker at Seattle. This should be qualified, however, by the statement that if it is shown by the evidence that the telegraphic message dated Oct. 1st, 1891, which is before you, was filed in the Cable Company's office at Sidney for transmission, addressed to the plaintiff as "Baker," and that the said message was received by the defendant at its Seattle office addressed to "Barker," and that such change in the address resulted in injury or damage to the plaintiff, then it is not necessary that the plaintiff should show at what point between Sidney and Seattle the error was made which resulted in such change in address.

V.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The burden of proof is upon the plaintiff to establish the facts necessary to entitle him to recover; and if he has failed to prove any necessary fact, or if he has failed to bring to the support of his contention a fair prepon-

derance of the evidence as to any fact about which there is a dispute your verdict should be for the defendant.

VI.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“The Court instructs you, however, that it is not incumbent upon the plaintiff to prove the exact point at which the error was made, or the manner in which the error was made. By reason of the fact that the means of establishing the point at which and the manner in which such errors are committed, whether on its own lines or connecting lines are peculiarly within the knowledge and control of the company, in a case where the error and damage have been established the burden of showing that the error was not made by the company or its agents or employees is cast upon the defendant. When in an action of this kind it is shown by competent evidence that a telegram has been delivered to a telegraph or cable company for transmission and that an error has been committed in its transmission resulting in damage and suit is brought against the company which last received and delivered the message, the law presumes that the responsibility for such error rests with that company, unless it can be shown that the error was committed by some connecting line; in other words, when the error is shown to have been committed the burden of proof is placed upon the com-

pany sued to show that it is not responsible for the error."

VII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The Court directs your attention to the testimony given by the depositions of Michael J. O'Leary, and G. R. Mockridge and Edward Chambers, and instructs you that neither one of the said witnesses are shown to be competent to testify as to the manner in which the telegraphic message in question was transmitted over the wire between any points or received at any point on its route."

VIII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"So far as the contents and address of the said message are concerned, the legal effect of the testimony of the two witnesses residing in Penzance is only that the message as recorded in the Penzance office was as shown by the copy attached to said depositions, and the same is true as to the witness O'Leary, the legal effect of his testimony upon that subject being only that the message on file in the office at New York was as shown by the copy annexed to his deposition."

IX.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“If you find that there is a fair preponderance of the evidence proving or tending to prove that there was a mistake in the address of the message, and that the message as received by the defendant at Seattle was addressed in a different way than when it was sent from Sidney, and that by reason of this error there was a misdelivery of the message and delay in delivering it to the plaintiff, and that by reason of that delay the plaintiff lost an opportunity to sell the cargo of lumber referred to in said message to a customer who was ready to buy it and pay for it, and that by losing that opportunity of sale he made a loss on the cargo by reason of the decline in the market, and that the defendant has not shown by competent evidence that the error was not committed by the defendant or any of its servants or employees, then your verdict should be for the plaintiff for the amount of his loss if you find all of these facts from the evidence. You have a right in determining these facts to take the positive testimony of the witnesses and ascertain what the circumstances are and to draw any inference that is necessarily deducible from the facts that are shown and proved on the trial. You have no right to bring into the case facts that are not based upon the evidence or facts that may be mere matters of surmise, but any inference that

may be reasonably and justly drawn from the testimony as to the conduct of the parties and the conduct of any agent or employee of the defendant, and from these facts and circumstances and the reasonable and necessary inferences to be drawn therefrom, determine the question of liability.”

X.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

“Now as to the measure of damages: If the plaintiff is entitled to recover at all he will be entitled to the difference between the price for which he could have sold the lumber if he had received the telegram promptly and acted upon it, and the market value of the lumber at Sidney between the date of the telegram and the time when it was delivered to him.

“If you find for the plaintiff, you will take the offered price and the market price at the date of the receipt of this telegram and allow as damages the difference between the two, with interest at the rate of seven per cent per annum from the date of the commencement of this action. I want you to understand by that that a man cannot make a loss and then claim as damages the difference between what he could have got for the property and what he did get for it if he held on to it on a declining market and waited until the bottom notch was reached; but he is entitled simply to be made good for the decline during the time that he was kept out of the opportunity

to deal with his property by reason of the delay in delivering the message."

XI.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"Now from all that a presumption naturally arises that the message was started right."

XII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The defendant company was in duty bound to use a reasonable and in fact a high degree of care and prudence in delivering the message to see that it got into the hands of the person for whom it was intended."

XIII.

That the said Court erred in giving the following instruction during the course of the charge to the jury, to wit:

"The manner in which the company's employees here in the Seattle office acted in regard to the delivery of this message, Mr. Baker's conduct and all the facts that are shown in the case, are to be taken into account and from all this you are to reach a decision as to whether or not this defendant has caused an injury by being negligent."

XIV.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit: .

“That there is nothing on the face of this telegram which would indicate to a person not acquainted with the transaction that it refers to a sale of lumber or that it was intended to be delivered to the plaintiff in this action. In cases where a telegram is so written that its contents convey no meaning to the agents of the telegraph companies into whose hands it may come for transmission and delivery, so that its importance may be fully understood, the sender takes the risk of the proper transmission and delivery of the message, and the company would be liable for but nominal damages for any error which might occur after it came into its hands.”

XV.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to wit:

“The Court instructs you that from all the evidence introduced in this case it appears that this telegram when delivered to the Western Union Telegraph Company at Penzance, in England, was addressed to “Barker” and not to “Baker.” It had no signature. There was nothing about the telegram from which the company could under-

stand that it was intended for "Baker." It was therefore not negligence on the part of the defendant to deliver the telegram to "Barker."

XVI.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

The jury is instructed that from all the evidence in this case the defendant does not appear to have been guilty of negligence either in the receipt, transmission, or delivery of the message which it received, and therefore your verdict must be for the defendant."

XVII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

"The jury is instructed that the measure of damages will be the difference between the price which was actually offered by the telegram of October 1st, 1891, and the highest price thereafter offered and which might have been obtained by the plaintiff for the lumber in question."

XVIII.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to wit:

“The burden of proof is on the plaintiff to establish all the material facts of his case essential to a recovery. Before he can hold the defendant liable for changing the address of this telegram from ‘Baker’ to ‘Barker’ he must show that it came into the hands of the defendant addressed to ‘Baker’ and was in some way changed to ‘Barker’ by the defendant, its officers or employees.”

XIX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to-wit:

“The Court instructs you that it appears from the evidence that the message in question came into the hands of the Western Union Telegraph Company at Penzance, England, at which place the message was delivered by the Eastern Cable Company to the defendant. If the jury finds that the message which was so delivered by the Eastern Cable Company to the defendant was at the time of such delivery addressed to “Barker” not “Baker,” then no negligence can be imputed to the defendant for delivering it to the only Barker at that time residing in Seattle who would be likely to be interested in transactions of any magnitude.”

XX.

That the said Court erred in refusing to give to the jury the following instruction requested by the plaintiff in error, to wit:

“I would like to have your honor instruct the jury that Mockridge and Chambers, superintendent and manager respectively of the Western Union Telegraph Company at Penzance, were competent to testify to the originality of the paper which is attached to their deposition as the copy made at the time of the receipt of the original telegram as it existed in that office and that that telegram made at that time is the best evidence of the contents of the telegram received at that office obtainable; in other words, that this telegram which is attached to this deposition, being identified as the original copy in the Penzance office, made at the time of the receipt of the telegram, is the best evidence of the contents of the telegram as received there.”

Wherefore, the said The Western Union Telegraph Company, plaintiff in error, prays that the said judgment of the Circuit Court of the United States for the District of Washington, Northern Division, be reversed, and that said court be directed to grant a new trial of said cause.

I. D. McCUTCHEON &

BURLEIGH & PILES,

Attorneys for the Western Union Telegraph Company,
Defendant, Plaintiff in Error.

Service of the foregoing assignment of error, on the undersigned this 8th day of July, 1897, is hereby admitted.

PRESTON, CARR & GILMAN,

Attorneys for H. W. Baker, Plaintiff and Defendant in
Error.

[Endorsed]: Assignment of Error. Filed July 8, 1897.
A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Citation.

The President of the United States, to H. W. Baker,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the state of California, on the 5th day of August, 1897, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER,
Chief Justice of the Supreme Court of the United States,
this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, and the Independ-

ence of the United States, the one hundred and twenty-first.

C. H. HANFORD,

District Judge, Presiding Judge of the United States Circuit Court for the District of Washington.

Attest:

A. REEVES AYRES,

Clerk of the Circuit Court of the United States, for the District of Washington.

[Seal]

By A. N. MOORE,

Deputy.

I hereby acknowledge service upon me of the foregoing citation, by delivery of a copy thereof to me, on this 9th day of July, 1897.

PRESTON, CARR & GILMAN,

Attorneys for Defendant in Error.

[Endorsed]: Filed July 9, 1897. A. Reeves Ayres,
Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Order to Send up Original Exhibits.

On motion of I. D. McCutcheon, and Burleigh & Piles, attorneys for defendant:

It is ordered that in addition to the transcript of the record on appeal in this action, that the clerk of this court transmit to the clerk of the United States Circuit Court of Appeals at San Francisco, the following original papers in this action, to be by him safely kept and returned to this court upon the final determination of this action in said court of appeals, namely: Stipulation to take the deposition of George R. Mockridge and Edward Chambers, together with the interrogatories and cross-interrogatories thereto annexed; and also

The deposition of said George R. Mockridge and Edward Chambers, together with the defendant's Exhibit A thereto attached, and also plaintiff's Exhibit A.

Dated this 26th day of July, 1897.

C. H. HANFORD,
Judge.

[Endorsed]: Order. Filed July 26, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

[Title of Court and Cause.]

Clerk's Certificate to Transcript.

United States of America, }
 District of Washington. } ss. ...

I, A. Reeves Ayres, clerk of the Circuit Court of the United States for the District of Washington, Ninth Judicial Circuit, do hereby certify the foregoing one hundred and eighty-four (184) typewritten pages, numbered from one (1) to one hundred and eighty-four (184) inclusive, to be a full, true, and correct copy of the record, and of all the proceedings had in the above and therein entitled suit, and that the same constitutes the return to the annexed writ of error wherein the above named defendant, the Western Union Telegraph Company, is plaintiff in error, and the above named plaintiff, H. W. Baker, is defendant in error, and that the same constitutes the transcript of the record upon appeal from the Circuit Court of the United States for the District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of preparing and certifying the said transcript on appeal, is the sum of fifty-five dollars and fifty-five cents (\$55.55), and that the same has

been paid to me by I. D. McCutcheon and Burleigh & Piles, attorneys for the defendant, and plaintiff in error, the Western Union Telegraph Company.

In testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, this 30th day of July, A. D. 1897.

[Seal]

A. REEVES AYRES,

Clerk U. S. Circuit Court, District of Washington, Ninth Circuit.

By R. M. HOPKINS,

Deputy Clerk.

[Title of Court and Cause.]

Writ of Error.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States, for the District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between the Western Union Telegraph Company, defendant and plaintiff in error, and H. W. Baker, plaintiff and defendant in error, manifest error hath happened to the great damage of the said, The Western Union Telegraph Company, plaintiff in error, as by this complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, on the 5th day of August, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[Seal]

A. REEVES AYRES,

Clerk of the United States Circuit Court for the Ninth Circuit, District of Washington.

By A. N. MOORE,

Deputy Clerk.

Allowed:

C. H. HANFORD,

Judge.

I hereby certify that a true copy of the foregoing writ of error was this day lodged with me and served upon me and by me duly filed.

Dated July 9th, 1897.

[Seal]

A. REEVES AYRES,

Clerk of the Circuit Court of the United States for the District of Washington.

By A. N. MOORE,

Deputy Clerk.

I hereby acknowledge service upon me of the foregoing writ of error by delivery of a copy thereof to me on this 9th day of July, 1897.

PRESTON, CARR & GILMAN,

Attys. for Deft. in Error.

[Endorsed]: Filed July 9, 1897. A. Reeves Ayres, Clerk. By A. N. Moore, Deputy.

Citation.

The President of the United States, to H. W. Baker,
Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the state of California, on the 5th day of August, 1897, pursuant to a writ of error, filed in the clerk's office of the Circuit Court of the United States, for the District of Washington, Northern Division, in that certain action

wherein the Western Union Telegraph Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety-seven, and the Independence of the United States, the one hundred and twenty-first.

C. H. HANFORD,

District Judge, Presiding Judge of the United States Circuit Court for the District of Washington.

Attest:

A. REEVES AYRES,

Clerk of the Circuit Court of the United States, for the District of Washington.

[Seal]

By A. N. MOORE,

Deputy.

I hereby acknowledge service upon me of the foregoing citation, by delivery of a copy thereof to me, on this 9th day of July, 1897.

PRESTON, CARR & GILMAN,

Attorneys for Defendant in Error.

[End of] Filed July 9, 1897. A. Reeves Ayres,

Clerk. By A. N. Moore, Deputy.

CABLE MESSAGE.

THE WESTERN UNION TELEGRAPH COMPANY.

All CABLE MESSAGES received for transmission must be written on the Message Blanks provided by this Company for that purpose, under and subject to the conditions printed thereon, and on the back hereof, which conditions have been agreed to by the sender of the following message.

NORVIN GREEN, President.

NUMBER

SENT BY

REC'D BY

NO. OF WORDS

FROM

2790

D

aa

13

Dychnoy

Received at

Seattle, Wash.

Boya West

1891
1889

To Barker

Seattle

Offered from pounds Thomson's Big
advice sheep market will no

cutlet

To guard against mistakes on the lines of this Company, the sender of every message should order it repeated; that is, telegraphed back from the terminus of said lines to the Originating Office. For such repeating, the sender will be charged in addition, one-half the usual tolls of this Company, on that portion of its lines over which such message passes.

This Company will not assume any responsibility in respect to any Message beyond the terminus of its own lines; and it is agreed between the sender of the following Message and this Company, that said Company shall not be liable for mistakes or delays in transmission or delivery, or for non-delivery to the next connecting Telegraph Company, of any unrepeated message, beyond the amount of that portion of the charge which may or shall accrue to this Company out of the amount received from the sender for this, and the other companies, by whose lines such message may pass to reach its destination; and that this Company shall not be liable for mistakes in the transmission or delivery, or for non-delivery to the next connecting Telegraph Company, of any repeated message, beyond fifty times the extra sum received by this Company from the sender for repeating such message over its own lines; and that this Company shall not be liable in any case for delays arising from interruptions in the workings of its lines, nor for errors in cipher or obscure messages. And this Company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company to reach its destination.

This Company is not to be liable for damages in any case, where the claim is not presented in writing, within thirty days after the sending of the message.

Plaintiff's Exhibit A.

FILED JUNE 27, 1895

IN THE

U. S. CIRCUIT COURT.

A. Reeves Ayres,

CLERK,

BY.....*R. M. Hopkins,*

DEPUTY.

“A”

(Transmitting Form.)

THE WESTERN UNION TELEGRAPH COMPANY

LESSEES OF

The American Telegraph and Cable Company.

Received from 851

Time 8 51

Clerk a

Transmitted to _____

Time 4 4 a

Clerk H

Remarks: _____

W. U. TEL. CO.

1 OCT. 91

PENZANCE, No. 7

PENZANCE STATION, 188

Prefix _____ No. of Message 7 No. of Words 13

From Sydney Station.

To { Barker
Seattle

<u>offered</u>	<u>four</u>	<u>pounds</u>
<u>thousand</u>	<u>of</u>	<u>advise</u>
<u>accept</u>	<u>market</u>	<u>dull</u>
<u>no</u>	<u>outlet</u>	

"D" This is the Exhibit a mentioned in the Eleventh Interrogatory and answer thereto by George Robert Mockridge of the annexed interrogatories and answer and signed by the said George Robert Mockridge 18th Nov 1893

Wellington Dale
Notary Public

“B”

THE WESTERN UNION TELEGRAPH COMPANY,

LESSEES OF

The American Telegraph and Cable Company.

Recd. from } <u>63</u>	Sent or handed to } <u>[Signature]</u>
Time <u>CP</u> m.	Time <u>[Signature]</u> m.
Clerk <u>[Signature]</u>	Clerk <u>[Signature]</u>

Prefix <u>in</u>	No. of Message <u>in</u>	No. of Words <u>10</u>	W. U. TEL. CO. 9 OCT. 91 PENZANCE.
To <u>7 PK</u>			

in Seattle WA
7 7 1st Baker
Seattle dcd
[Signature]

This is the Exhibit B mentioned in the fifth interrogatory and answer thereto by George Robert Mockridge of the annexed interrogatories and answers and signed by the said George Robert Mockridge

18th Nov 1893

Wellington Dale
Notary Public

“B”

THE WESTERN UNION TELEGRAPH COMPANY,

LESSEES OF

The American Telegraph and Cable Company.

Recd. from } <u>5 34</u>	Sent or handed to } <u>5 50 a</u>
Time <u>5 34</u>	m. Time <u>5 50 a</u>
Clerk <u>B</u>	Clerk <u>B</u>

Prefix <u>W</u>	No. of Message <u>2</u>	No. of Words <u>22</u>
To <u>PK</u>	W. U. TEL. CO. 9 OCT. 91 PENZANCE.	

from NY for Seattle
 via 1st Barker
 Seattle and un-
 rec'd by Barker
 first part sent
 not for him
 W.U. #10

answer made by Secy for
 answer and signed by the said Secy
 11/2/91 to advise
 Helms, include history of the
 G. No. 1005

G. No. 1005

“B”

THE WESTERN UNION TELEGRAPH COMPANY,

LESSEES OF

The American Telegraph and Cable Company.

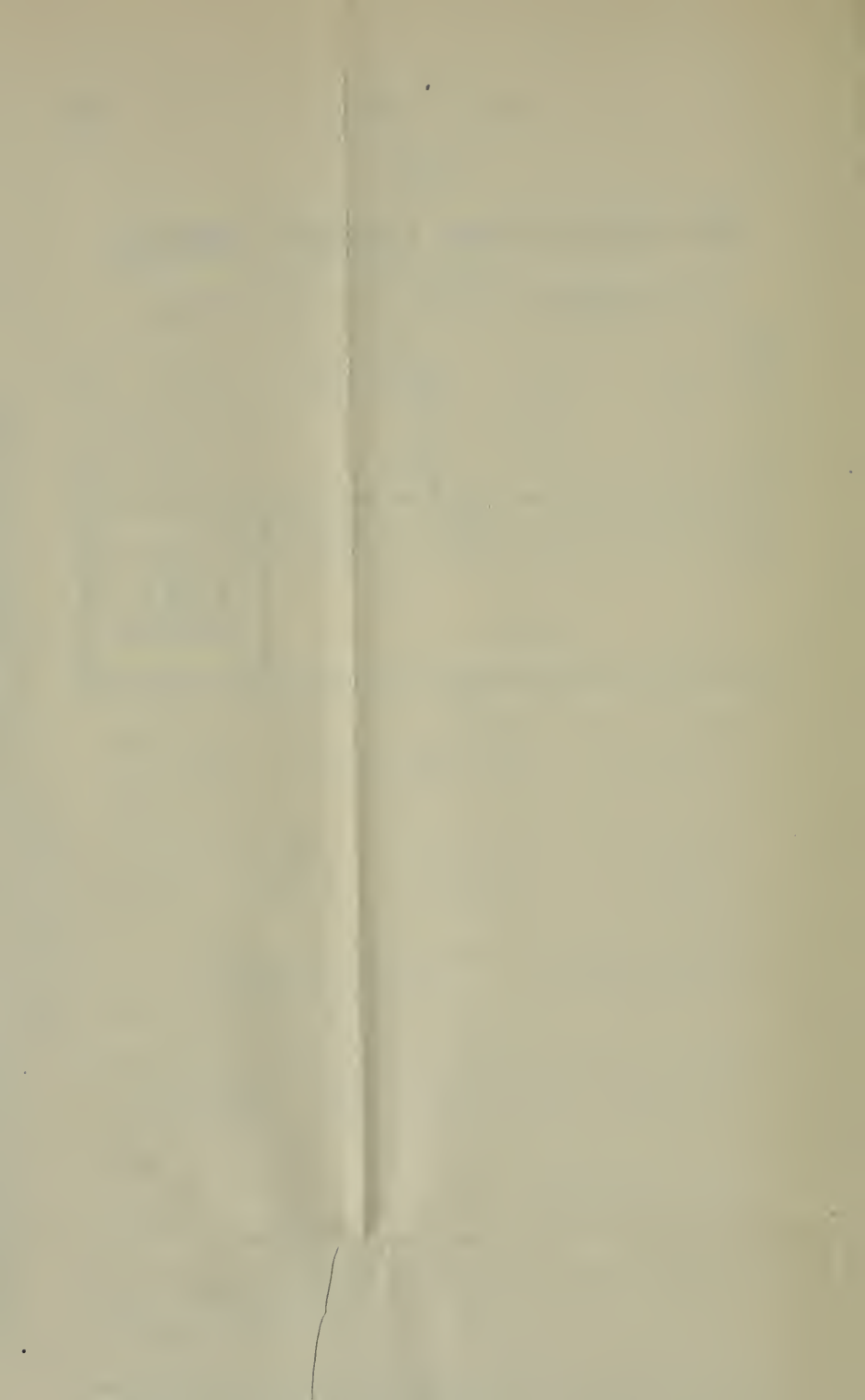
Recd. from		Sent or handed to	
Time	2 12 m.	Time	9 19 m.
Clerk	P	Clerk	Luff

Prefix	No. of Message	No. of Words	W. U. TEL. CO. 9 OCT. 91 PENZANCE.
To	10 W. U. C.	15	

fm East over
 7/1 Is to
 Baker Seattle
 use day if still
 undecid
 waiting

and message paid separately by the first receipt to our messenger
 (Hollingshead) D. D.
 Director Public

W. U. M. Co.



[Title of Court and Cause.]

Stipulation.

It is stipulated between the parties hereto that the depositions of G. R. Mockridge and E. Chambers, witnesses for the defendant, residing at Penzance, Cornwall, England, may be taken by virtue of this stipulation (and without commission or other authority or power) by any notary public there residing, at such time as said notary may fix; and the taking of said depositions may be adjourned from time to time to suit the convenience of said notary and said witnesses, provided that nothing herein contained shall unreasonably delay the trial of this action.

The certificate and seal of said notary shall be sufficient proof of his name and official character, without other or further authentication; all other formalities being hereby expressly waived:

Said deposition, when taken, shall be mailed by said notary to the clerk of the above entitled court, Seattle, Washington, U. S. A., and may be read in evidence by either party, subject only to objection as to the competency, materiality or relevancy of the testimony set forth therein.

Dated October 2nd, 1893.

STRATTON, LEWIS & GILMAN,
Plaintiff's Attorneys.

TURNER & McCUTCHEON,
Attorneys for Defendant.

Title of Court and Cause.]

Interrogatories.

Interrogatories to be propounded to G. R. Mockridge and E. Chambers, witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England:

First Interrogatory.

What is your name, age, occupation and place of residence?

Second Interrogatory.

What, if any, position did you hold in the employ of the defendant, the Western Union Telegraph Company, on October 1st, 1891, and where were you so employed?

Third Interrogatory.

If you answer the second interrogatory that you were on said day employed in conducting the defendant's business at Penzance, in the capacity you mention, you may state how long you held such position at Penzance, prior to October 1st, and whether you have held it since, and if so to what time?

Fourth Interrogatory.

Do you know what person or company was operating telegraph cable line from Penzance to New York on October 1st, 1891?

Fifth Interrogatory.

If you answer the fourth interrogatory in the affirmative, you may state who the person or company was.

Sixth Interrogatory.

If in answer to the fifth interrogatory you say it was the defendant the Western Union Telegraph Company, you may state if the defendant company received, at Penzance, from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, Washington, addressed to "Barker" or "Baker"?

Seventh Interrogatory.

If you answer the sixth interrogatory in the affirmative you may state what person or telegraph company delivered said message to the defendant for such transmission.

Eighth Interrogatory.

If you answer the seventh interrogatory that it was the

Eastern Telegraph Company you may state if you know whether that company operated a telegraph line between Sydney and Penzance.

Ninth Interrogatory.

Do you know whether the defendant, the Western Union Telegraph Company was on the 1st day of October, 1891, the owner or lessee of, or was operating, the telegraph line over which said message came from Sydney to Penzance?

Tenth Interrogatory.

If you answer the ninth interrogatory in the affirmative you may state whether on the 1st day of October, 1891, the defendant, the Western Union Telegraph Company, was the owner, lessee of, or was operating said line on said date, or when said message was transmitted over the same?

Eleventh Interrogatory.

If you have the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, and referred to in the sixth interrogatory, you will here produce it and deliver it to the officer taking your deposition, identify it and cause it to be annexed to your deposition and marked "Exhibit A."

Twelfth Interrogatory.

Was any message received by the Western Union Telegraph Company on October 1st, 1891, at Penzance, from Sydney, Australia, addressed to "Baker," Seattle, and reading, "Offered four pounds thousand cif advise accept. Market dull. No outlet."

Thirteenth Interrogatory.

State whether on the 1st day of October, 1891, the message referred to in the sixth interrogatory was transmitted by the defendant, the Western Union Telegraph Company, from Penzance to New York, and if so, on what day the same was so transmitted.

Fourteenth Interrogatory.

Was the defendant at any time, to your knowledge, informed that the message "Exhibit A" was for "Baker" and not "Barker," Seattle? If so, when, where and by whom was such information given?

Fifteenth Interrogatory.

If you answer the fourteenth interrogatory in the affirmative was such information in writing? If yea, and you have such writing, you will produce it and deliver it to the officer taking your deposition, identify it and cause

it to be annexed to your deposition, and marked "Exhibit B."

Sixteenth Interrogatory.

Was any other message received by the defendant at Penzance from Sydney, Australia, for transmission to Seattle, Washington, on or about October 1st, 1891, than the message marked "Exhibit A," addressed either to "Barker" or "Baker"?

Seventeenth Interrogatory.

Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or either of them, or that may be material to the subject of this, your examination, or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

[Title of Court and Cause.]

Cross-Interrogatories.

Cross-interrogatories to be propounded to S. R. Mockridge and E. Chambers, witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England.

First Cross-Interrogatory.

You are working, you say, for the Western Union Tele-

graph Company of the United States, or that you were on October 1st, 1891?

Second Cross-Interrogatory.

Do you say that a message came over the wire addressed "Baker, Seattle, Washington. Offered four pounds thousand cif. Advise accept market dull no outlet." If so, did you receive this message? If you did not receive this message yourself, who did? Did you transmit it to New York? If you did not, who did? If you did not transmit this message yourself, how do you know its contents? Why will you swear that it said: "Offered four pounds thousand"? Did it not say "Offered fourteen pounds thousand"? Are you sure that the message was simply "Baker, Seattle. Offered four pounds thousand," and not fourteen pounds? Why are you sure, if you say you are, that it was only four pounds instead of fourteen?

Third Cross-Interrogatory.

Did you transmit the message as you received it? Do you admit that you transmitted the message? If you transmitted the message did you transmit it from your office—that is, the Western Union Telegraph Company's office—for which you are acting, "Barker, Seattle. Offered four pounds thousand cif. Advise accept, market dull, no outlet"?

Fourth Cross-Interrogatory.

How do you know what arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance? Did you make this arrangement? Do you know if they had any arrangement at all? When did the Western Union Telegraph Company become the owner of the said line? Or if you say they only leased it, when was it they leased it? What is your position? How do you know anything about the leasing and the owning of these lines? Are you president, secretary or manager? Do you sign the papers for this company and make their contracts? If you say yes, state who gave you this authority and when you got it. Was it yourself who signed the lease leasing this line? Who signed the indenture when this line was bought by the Western Union Telegraph Company?

Fifth Cross-Interrogatory.

Is the message, called original message which you have attached to your direct interrogatory, known as eleven, the message you received? What change has been made in it since it was received? Do you say that you have sent the original message out of the office and attached it to this interrogatory? If so, by what authority have you sent the original message from your office? Who told you to do it? Is it not true that you have made a copy of it, as you felt it was your duty, and attached the copy in-

stead of sending the original message, the official paper out of your office here to the city of Seattle, in the State of Washington, United States of America?

Sixth Cross-Interrogatory.

Is it not true that you have destroyed what you called the original message received in this case? Is it not true that you have a rule in your office to destroy these original messages every six months from the date they are received? Is it not true that pursuant to this rule this message, with all other messages, was destroyed? If not—if you say it is not so, why was it that you kept this one message? Is it not true that the message as attached is not the original message at all, but that the original message has been destroyed, and the message you attached is one that has been prepared?

Seventh Cross-Interrogatory.

Who have you consulted before you have given your testimony here concerning your testimony? What matters were you told to testify and what matters were you told to omit? Have you consulted the solicitor of the company at your place or its barrister? Did any general manager of your company or person acting for it consult with you concerning your testimony? If so, what was said to you? Have you received any letters from the general solicitor of your company or any other solicitors advising you what your testimony should be, or the nature of it, or

the manner of it, or what it was to be directed to or what not, or explaining to you these interrogatories, or any part of them, or any portion of them, or what to do concerning any of them? If so, from whom were these communications received and when did you receive them? Have you been advised not to speak of these communications?

Eighth Cross-Interrogatory.

If you say you received no such communications, do you now say so for the reason that you are advised so to say? If you say it is not so—that you have not been so advised, then why do you say you have not received such communications, if you so say?

STRATTON, LEWIS & GILMAN,

Solr's for Plaintiff.

TURNER & McCUTCHEON,

Attys. for Deft.

[Endorsed]: Filed Dec. 19, 1893. In the U. S. Circuit Court. A Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Title of Court and Cause.]

Answers to Interrogatories.

To all to whom these presents shall come:

I, Wellington Dale, notary public, residing and practicing at Penzance, in the County of Cornwall, England, do hereby certify that pursuant to the stipulation signed by the attorneys for the above named plaintiff and defendant, and dated the 2nd day of October, 1893, George Robert Mockridge and Edward Chambers, the witnesses named in the said stipulation, appeared before me on the 15th and 16th and 18th days of November, instant, when I took and completed their answers or depositions to the interrogatories and cross-interrogatories propounded by the said attorneys respectively in the above-named action, the said answers or depositions being hereunto annexed, and I further certify that previous to such answers or depositions being taken I duly administered to the said George Robert Mockridge and Edward Chambers the following oath: "You and each of you are true answers to make to all such questions as shall be asked you and each of you upon these interrogatories and cross-interrogatories without favor or affection to either party and therein you and each of you shall speak the truth, the whole truth, and nothing but the truth. So help you God."

In Testimony Whereof, I, the said notary have hereunto subscribed my name and affixed my seal of office at Penzance aforesaid this eighteenth day of November, 1893.

[Seal]

WELLINGTON DALE,
Notary Public, Penzance.

[Title of Court and Cause.]

Answers to Interrogatories by G. R. Mockridge.

Answers to interrogatories propounded to George Robert Mockridge and Edward Chambers, witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England, taken by Wellington Dale, of Penzance, aforesaid, notary public:

The said George Robert Mockridge, being first duly sworn, on oath deposes and says:

In Answer to the First Interrogatory.

George Robert Mockridge, 39 years of age, superintendent of the Western Union Telegraph Company at Penzance, and I reside at Trewithen Road, Penzance.

Second Interrogatory.

Superintendent, and I was then employed at Penzance.

Third Interrogatory.

Just over ten years prior to 1st October last, and since that time to the present date.

Fourth Interrogatory.

Yes.

Fifth Interrogatory.

The Western Union Telegraph Company.

Sixth Interrogatory.

The Western Union Telegraph Company did receive at Penzance from Sydney, Australia, on 1st day of October, 1891, a message for transmission by it to Seattle addressed to "Barker."

Seventh Interrogatory.

The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Eighth Interrogatory.

The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Ninth Interrogatory.

The Western Union Telegraph Company was on 1st October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and

Porthcurno in conjunction with the said Eastern Telegraph Company.

Tenth Interrogatory.

See my reply to the ninth interrogatory.

Eleventh Interrogatory.

I produce the said original message delivered by the Eastern Telegraph Company to the Western Telegraph Company on October 1st, 1891—and it is annexed to this deposition and marked “Exhibit A.”

Twelfth Interrogatory.

No.

Thirteenth Interrogatory.

The message referred to in the sixth interrogatory addressed “Barker, Seattle,” was transmitted by the said Western Union Telegraph Company from Penzance to New York on 1st day of October, 1891.

Fourteenth Interrogatory.

The defendant was informed that the message, “Exhibit A,” was for “Baker” and not “Barker,” Seattle, on the 9th day of October, 1891, at Penzance by wire received from the Eastern Telegraph Company from their Porthcurno station.

Fifteenth Interrogatory.

I produce the wire writing received and it is annexed to this, my deposition, and marked “Exhibit B.”

Sixteenth Interrogatory.

No.

Seventeenth Interrogatory.

No.

G. R. MOCKRIDGE.

Sworn at Penzance, Cornwall, England, this 18th day of November, 1893, before me.

[Seal]

WELLINGTON DALE,

Notary Public.

[Title of Court and Cause.]

Answers to Cross-Interrogatories by G. R. Mockridge.

Answers to cross-interrogatories propounded to George Robert Mockridge and Edward Chambers, witnesses for the defendant in the above-entitled action, residing at Penzance, Cornwall, England, taken by Wellington Dale, of Penzance aforesaid, Notary Public.

The said George Robert Mockridge, in answer to the first cross-interrogatory, says:

Yes.

Second Cross-Interrogatory.

I do not say that a message came over the wire addressed, "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet. I did not receive such message. No one received such message. I did not transmit it to New

York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to "Barker, Seattle," did say "Offered four pounds thousand." It did not say "offered fourteen pounds thousand." I am sure that the message was "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet," and not "Baker, Seattle, offered four pounds thousand," and not "fourteen pounds. I am so sure because I have seen and have now before me the original message itself.

Third Cross-Interrogatory.

We did transmit the message as it was received. I admit that we did transmit the message. The message was transmitted from the Western Union Telegraph Company's office for which I am acting, as follows: "Barker, Seattle, offered four pounds thousand cif. advise accept market dull no outlet."

Fourth Cross-Interrogatory.

I do not know of any arrangements the Western Union Telegraph Company had with the line from Sydney to Penzance beyond what is stated in my replies to the eighth and ninth interrogatories. I know of the arrangements on the line between Penzance and Porthcurno, because of our using such line, but I do not know of any arrangements on the line between Penzance and Sydney.

The Western Union Telegraph Company did not become owner of the said line. They leased the line be-

tween Penzance and Porthcurno as aforesaid about eight years ago.

I am superintendent. I know nothing about the leasing and owning of these lines except that we work over the line between Penzance and Porthcurno and not beyond. I am neither president, secretary nor manager. I do not sign the papers for this company nor make their contracts. I did not sign the lease, and I do not know of any such indenture having been signed.

Fifth Cross-Interrogatory.

The said original message is not known as eleven, but is known as number seven and is the message I received. There has been no change made in it since it was received.

I do not say that I have sent the original message out of the office and attached it to this interrogatory.

By the original message I mean the message as received at our office at Penzance and not the message as written by the sender in Sydney.

I sent the original message by the authority of the London representative of the Western Union Telegraph Company. The said London representative told me to do it. It is not true that I made a copy of it and attached the copy instead of sending the original message; the original message itself sent.

Sixth Cross-Interrogatory.

I have not destroyed the original message received in this case. It is not true that we have a rule in our office

to destroy these original messages every six months from the date they are received. It is not true that this message, with all other messages, was destroyed in pursuance to any rule.

This one message was kept in the usual way with the other messages. It is not true that the message attached is not the original message, as the original message is the one attached hereto; it has not been destroyed. The message attached has not been prepared.

Seventh Cross-Interrogatory.

I have consulted no one before giving my testimony concerning such testimony.

I was not told to testify to anything, nor was I told to omit anything. I have not consulted the solicitor to the company at my place nor its barrister. No general manager of my company nor any person acting for such company consulted me concerning my testimony.

I have received one letter only and that from the general solicitor of my company, and such letter did not advise me what my testimony should be or the nature of it or the manner of it, but such letter did point out to what my testimony should be directed. Such letter further explained that I should take the interrogatories before a notary and reply to them.

This communication was received by me from George H. Fearons on the 9th day of November, 1893.

I have not been advised not to speak of this communication.

Eighth Cross-Interrogatory.

I say again that the only communication which I have received is the letter mentioned in my reply to the last cross-interrogatory.

G. R. MOCKRIDGE.

Sworn at Penzance, Cornwall, England, this 18th day of November, 1893, before me.

[Seal]

WELLINGTON DALE.

Notary Public.

[Title of Court and Cause.]

Answers to Interrogatories by Edward Chambers.

Answers to interrogatories propounded to George Robert Mockridge and Edward Chambers witnesses for the defendant in the above entitled action, residing at Penzance, Cornwall, England, taken by Wellington Dale of Penzance aforesaid, Notary Public.

The said Edward Chambers, being first duly sworn, on oath deposes and says:

In Answer to the First Interrogatory.

My name is Edward Chambers, and I am the manager of the Penzance office of the Western Union Telegraph Company and reside at Alverton Lodge, Penzance, and am 42 years of age.

Second Interrogatory.

On the first October, 1891, I was manager of the Penzance office of the Western Union Telegraph Company, and I was then employed at Penzance.

Third Interrogatory.

I held the office of manager of the said Penzance office for about 7 years prior to 1st October, 1891, and have held it since that time and still hold it.

Fourth Interrogatory.

Yes.

Fifth Interrogatory.

The Western Union Telegraph Company.

Sixth Interrogatory.

The Western Union Telegraph Company received at Penzance from Sydney, Australia, on the 1st day of October, 1891, a message for transmission by it to Seattle, addressed to "Barker."

Seventh Interrogatory.

The Eastern Telegraph Company delivered by wire from their Porthcurno station the said message to the said Western Union Telegraph Company for such transmission.

Eighth Interrogatory.

The Eastern Telegraph Company operated a telegraph line between Sydney and Penzance.

Ninth Interrogatory.

The Western Union Telegraph Company was on the 1st October, 1891, operating the telegraph line over which the said message came between Penzance and Porthcurno in conjunction with the Eastern Telegraph Company, but not from Sydney to Penzance. The Western Union Telegraph Company were not owners or lessees of such line on that date, except so far as being lessees as aforesaid of that part of the line between Penzance and Porthcurno in conjunction with the said Eastern Telegraph Company.

Tenth Interrogatory.

See my reply to the last interrogatory.

Eleventh Interrogatory.

I have not the original message delivered by the Eastern Telegraph Company to the Western Union Telegraph Company on October 1st, 1891, but it is now produced to me marked "Exhibit A" and annexed to the depositions of George Robert Mockridge, made herein this day.

Twelfth Interrogatory.

No message was received by the Western Union Telegraph Company on October 1st, 1891, at Penzance from Sydney, Australia, addressed to "Baker," Seattle, and reading "offered four pounds thousand cif advise accept market du ll no outlet."

Thirteenth Interrogatory.

The message referred to in the sixth interrogatory addressed "Barker, Seattle," was transmitted by the said Western Union Telegraph Company from Penzance to New York on 1st day of October, 1891.

Fourteenth Interrogatory.

The defendant was informed that the said message, "Exhibit A," to the deposition of the said George Robert Mockridge, was for "Baker" and not "Barker," Seattle, on the 9th day of October, 1891, at Penzance by wire received from the Eastern Telegraph Company from the Porthcurno station.

Fifteenth Interrogatory.

The information was by wire and is annexed to the said deposition of the said George Robert Mockridge, marked "Exhibit B," and now produced to me.

Sixteenth Interrogatory.

No.

Seventeenth Interrogatory.

No.

Answers to Cross-Interrogatories by Edward Chambers.

First Cross-Interrogatory.

Yes.

Second Cross-Interrogatory.

I do not say that a message came over the wire addressed "Baker, Seattle, Washington, offered four pounds thousand cif advise accept market dull no outlet." I did not receive such message. No one received such message. I did not transmit it to New York. No one transmitted it. I could not and did not know the contents of a message which was not received. I swear that the message which was received addressed to "Barker," Seattle, did say "offered four pounds thousand." It did not say, "offered fourteen pounds thousand." I am sure that the message was "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet," and not "Baker, Seattle, offered four pounds thousand," and not "fourteen pounds." I am so sure because I have seen and have now before me the original message itself, being Exhibit A above referred to.

By the words "original message" I mean the message as received by our company at Penzance.

Third Cross-Interrogatory.

I did not transmit the said message personally, but I know that such message was transmitted by our office as received and as follows: "Barker, Seattle, offered four pounds thousand cif advise accept market dull no outlet."

Fourth Cross-Interrogatory.

I do not know of any arrangements which the Western Union Telegraph Company had with the line from Sydney to Penzance.

I made no arrangement. I only know of the arrangement on the line between Penzance and Porthcurno because of our using such line, but I do not know of any arrangement on the line between Penzance and Sydney. The Western Union Telegraph Company did not become owner of the said line. They leased the line between Penzance and Porthcurno as aforesaid in conjunction with the Eastern Telegraph Company. I am manager of the office at Penzance.

I do not know about the leasing and owning of the lines except that we work over the line between Penzance and Porthcurno and not beyond. I am not president nor secretary, but I am the manager of the Penzance office. I do not sign the papers for this company and make their contracts. I did not sign any lease. I do not know of any indenture by which the Western Union Telegraph Company bought this line.

Fifth Cross-Interrogatory.

The message called original message, marked Exhibit A and annexed to the deposition of the said George Robert Mockridge, is not known as eleven, but as number seven and is the message received. There has been no change in it since it was received. I did not send the original message out of the office, the said George Robert Mockridge did and attached to his interrogatory. The original message is attached to the depositions and not a copy thereof.

Sixth Cross-Interrogatory.

I have not destroyed the original message received in this case. It is not true that there is a rule in our office to destroy these original messages every six months from the date they are received. It is not true that pursuant to any rule this message with all other messages was destroyed.

This message was kept in the same way as other messages. It is not true that the message as attached is not the original message and that the original message has been destroyed, because the original message has not been destroyed, but is attached as already stated and the message attached is not one which has been prepared.

Seventh Cross-Interrogatory.

I have consulted no one before giving my testimony here concerning such testimony.

I was not told to testify to any matters, neither was I told to omit any matter.

I have not consulted the solicitor to the company at my place or its barrister.

No general manager of our company or person acting for it consulted with me concerning my testimony, unless it can be said that the action of my superintendent, the said George Robert Mockridge, informing me that I had to answer these interrogatories can be called consulting one. I have not received any letters from the general so-

dictor of our company or any other solicitor advising me what my testimony should be or the nature of it, or the manner of it, or what it was to be directed or what not, or explaining to me these interrogatories or any part of them, or any portion of them or what to do concerning any of them. I have not been advised not to speak of any communication, because I have received none.

Eighth Cross-Interrogatory.

I do not say that I have received no communication, because I have been advised so to say. I say that I have not received such communication because I have not.

EDWARD CHAMBERS.

Sworn at Penzance, Cornwall, England, this 18th day of November, 1893, before me.

[Seal]

WELLINGTON DALE,

Notary Public.

[Endorsed]: Published and filed Dec. 19, 1893, in the U. S. Circuit Court. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

[Endorsed]: No. 391. United States Circuit Court of Appeals, for the Ninth Circuit. The Western Union Telegraph Company, Plaintiff in Error, v. H. W. Baker. Transcript of Record. Error to the United States Circuit Court for the District of Washington, Northern Division. Filed Aug. 3, 1897.

F. D. MONCKTON,
Clerk.

